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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 384

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER

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January 14, 1939.

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OCTOBER TERM, 1938.

UARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, *Petitioner,* *against* ERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, *Respondents.*	No. 384

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court for the Eastern District of Missouri, Eastern Division, wrote no opinion, but made findings of fact and conclusions of law (R. 127-143). The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 246-254) is reported in 98 F. (2d) 160.

JURISDICTION

The decree of the Circuit Court of Appeals for the Eighth Circuit was entered July 15, 1938 (R. 254-5). The petition for a writ of certiorari was filed on September 27, 1938, and was granted on November 7, 1938, U. S. (R. 258). The jurisdiction of this Court rests upon the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

QUESTIONS PRESENTED

The petitioner, acting as trustee for the holders of 5,636 bonds of the St. Louis Southwestern Railway Company, the Debtor in reorganization proceedings under Bankruptcy Act § 77, filed proof of claim on behalf of the bondholders for the stated number of Dutch guilders which the Debtor promised to pay as principal and interest in each of the 5,636 bonds and applicable coupons. Unsuccessful demand, and protest for non-payment, of the bonds and coupons in guilders had been formally made in Amsterdam, Holland, in accordance with Dutch law (R. 137, 169, 174). Both courts below disallowed the petitioner's claim for guilders on account of principal and interest on the sole ground that it was barred and rendered unenforceable by the Joint Resolution of Congress of June 5, 1933, 48 Stat. 112, popularly known as the "Gold Clause Resolution". Although other objections to the guilder claim had been raised by the respondents, neither of the courts below passed on them, the District Court stating that it was "unnecessary" to do so (R. 143). Thus the only questions presented

for review by this Court are those raised in the petition for certiorari and determined adversely below, namely:

1. Does the Joint Resolution of June 5, 1933, 48 Stat. 112, abrogating "gold clauses", annul a negotiable contract executed in 1912 by the Debtor wherein it agreed to pay to the holder of the instrument a stated number of Dutch guilders at Amsterdam, Holland?

2. Would the identical promise (otherwise valid) be void merely because of an unexercised and subsequently discarded option in the obligee to obtain, as an alternative to payment in guilders, payment in any one of four other specified currencies, one of these discarded alternative currencies having been gold coin of the United States of or equal to the standard of weight and fineness as it existed January 1, 1912?

3. In the case of a five-part alternative promise to be exercised at the election of the creditor, one of the alternatives being gold coin of the United States of specified weight and fineness, does the Joint Resolution of June 5, 1933, properly construed, abrogate the other alternatives and require the discharge of the entire contract upon the payment of the gold coin amount in legal tender dollars, contrary to the election of the creditor?

4. If so, is the Joint Resolution a constitutional exercise of the power of Congress?

These were the questions stated in petitioner's application for certiorari (p. 2), as being the only questions which

it was believed this Court would desire to consider in view of the fact that the decisions below adverse to the petitioner were predicated exclusively upon the Joint Resolution. *Guaranty Trust Company of New York* v. *U. S.*, 304 U. S. 126, 144.

STATUTE INVOLVED

The Joint Resolution of June 5, 1933

[48 Stat. 112, Public Resolution—No. 10—73d Congress H. J. Res. 192]

"Joint Resolution

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in

made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled 'An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,' approved May 12, 1933, is amended to read as follows:

'All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.'

Approved, June 5, 1933, 4.40 p.m."

STATEMENT OF THE CASE

Shortly before April 24, 1912, St. Louis Southwestern Railway Company (referred to herein as the Debtor), a Missouri corporation, authorized an issue of bonds to be known as its First Terminal and Unifying Mortgage Bonds, and to be secured by a corporate mortgage on its property. Guaranty Trust Company of New York, a New York corporation, and an individual became trustees under the mortgage. The mortgage, dated January 1, 1912, contemplated the issuance of a limited amount of bonds, which might be either coupon bonds with provision for registration as to principal or registered bonds without coupons. The 5,636 bonds immediately involved here (R. 126) are all coupon bonds. Under a general provision to such effect in the mortgage (R. 38-9) the form of coupon bond set forth in the Mortgage Indenture (R. 19, 130) and issued thereunder, was headed:

"No. ————

$1,000.	$1,000.
U. S. Gold	U. S. Gold
£205 15s. 2d. Stg.	2490 Guilders
Marks 4200. D.R.W.	5180 Francs

and provided that the Debtor . . .

> "hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, *or in Amsterdam, Holland, 2,490 guilders,* or in Berlin, Germany, marks 4200, D.R.W., or in Paris, France, 5180 francs, ... Payment of the principal and interest of this bond will be made, *at the holder's option,* at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or *at designated offices in the foreign cities and countries above mentioned*" (R. 19).[1]

The coupons for interest also contained multiple currency provisions substantially similar in form to those in the bonds. The form of the coupon was as follows (R. 22, 131):

"No. ——————

$25.	$25.
105.05 Marks.	£5 2s 10½d.
129.50 Francs	62.25 Guilders.

On the first day of , 19

St. Louis Southwestern Railway Company will pay to the bearer, *upon presentation and surrender* of this coupon for cancellation, at its office or agency in the Borough of Manhattan, in the City of New

[1] Italics in this brief are ours, unless otherwise designated.

> York, Twenty-five Dollars ($25) in United States gold coin, *or in* London, England, £5 2s. 10½d. Sterling, *or in* Amsterdam, Holland, 62.25 guilders, *or in* Berlin, Germany, 105.05 marks, *or in* Paris, France, 129.50 francs, being six months' interest then due upon its First Terminal and Unifying Mortgage Bond, No. ."

These bonds were issued in 1912 by the Debtor to an original group of American purchasers who paid dollars therefor and were resold to the public generally (R. 132-4). Before executing the mortgage, the Debtor made arrangements for the payment from time to time of the foreign exchange value of such guilders and other foreign currencies as might be demanded pursuant to the foreign currency alternatives in the bonds and coupons (R. 172-3). The fact that such arrangements were made demonstrates that the Debtor had no thought of the guilder option as a gold clause. Furthermore, the Debtor's president in his letter (summarized in the offering circular of the bonds) held forth to intending purchasers the multiple currency options (R. 133-4, 160). The record does not show to what extent purchasers then and subsequently relied upon this inducement, but it does show that the Debtor received valuable and sufficient consideration for the bonds, of which the guilder option was an integral part (R. 160), and that the bonds have been listed on the New York Stock Exchange since 1915 and have been actively traded in from that time on (R. 132-4). It is also a matter of record, and is uncontroverted, that many of these bonds have been held and are now held by citizens of foreign countries (R. 135, 198).

On December 12, 1935, the Debtor's petition for reorganization under Bankruptcy Act § 77 was filed and ap-

proved (R. 183). On January 1, 1936, the Debtor failed to pay interest on the coupon bonds as well as other obligations (R. 159), which non-payment was made an event of default on April 1, 1936 by the First Terminal and Unifying Mortgage (R. 66). Such default gave rise to broad powers in the petitioner as trustee under the Mortgage (R. 69-71, 76), authorizing it to protect and enforce the rights of bondholders thereunder by suits in equity or at law, or by any other proper or legal remedies, and also to accelerate the maturity of the bonds. These broad powers necessarily included a corollary or ancillary right in the Trustee to elect on behalf of the bondholders the most advantageous currency within the range of alternatives granted by the coupon bonds and the Mortgage.[2]

On April 11, 1936, an event of default having occurred on April 1, 1936, the Debtor attempted to enjoin the petitioner from accelerating the maturity of the outstanding First Terminal and Unifying bonds. This attempt failed. *Guaranty Trust Company of New York* v. *Henwood*, 86 F. (2d) 347, certiorari denied 300 U. S. 661. The petitioner then served a notice of acceleration as of May 5, 1936 (R. 136).

On June 4, 1936, the petitioner published notice that it intended within a short time to elect to receive payment in guilders, and to file a proof of claim on a guilder basis, in respect of all coupon bonds the holders of which had not

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[2]The respondents challenged the right of the petitioner to make an election of the medium of payment on behalf of those bondholders who had made no election. Neither the District Court nor the Circuit Court of Appeals determine this question, regarding it as immaterial in so far as their decisions were concerned.

previously acted in their own behalf (R. 179).[3] Thereafter on September 24, 1936, the petitioner caused formal demand and protest to be made by a bailiff in Amsterdam, in accordance with the law of Holland (R. 137, 169-172, 174-176), requiring the Debtor to pay immediately in guilders the principal and interest to it on behalf of all bondholders who had not previously made their own elections. This demand was not honored.[4] On the same day the petitioner verified and mailed its proof of claim on behalf of those bondholders who had not filed their own proofs of claim (R. 2-6).

The exchange value of the guilder was 67.78 cents alike on the date of bankruptcy, of acceleration and of demand and protest of non-payment (R. 140; *cf.* R. 164, 104). The aggregate amount of principal claimed for the holders of 5,636 bonds by the petitioner was 14,033,640 Dutch guilders (2490 being the principal amount of guilders promised in each bond), having a dollar value at 67.78 cents of $9,512,001.19.

The District Court disallowed the guilder claim in its entirety, without finding any exchange rate for the guilder.

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[3]This notice, published in four American and three foreign newspapers, requested bondholders who did not desire an election to be made in guilders to notify the petitioner (R. 177). After the publication of the notice some bondholders specifically authorized the petitioner to elect guilders for them (Claimant's Exhibit 9, R. 180-3); a few bondholders filed individual proofs of claim electing dollars; while a more numerous class individually elected guilders.

[4]The failure of the Debtor to maintain an office or agency in Amsterdam (R. 132), despite its agreement to make payment there, constituted a refusal which rendered any demand unnecessary. *Sokoloff* v. *National City Bank*, 250 N. Y. 69 (1929).

Instead, the District Court allowed the claim as one for $1,000 principal on each bond, or $5,636,000 on the 5,636 bonds, with interest at 5% per annum from July 1, 1935, to December 12, 1935 (R. 126). This allowance was less by $3,876,001.19 than the dollar value of the aggregate amount of guilders claimed by the petitioner on account of principal, in accordance with the precise terms of the bonds, and correspondingly less than the amount claimed as interest.

On the petitioner's appeals the Circuit Court of Appeals for the Eighth Circuit, on July 15, 1938, affirmed the order of the District Court (R. 254-5, 98 F. [2d] 160).

DECISION OF THE DISTRICT COURT

(R. 127-143)

(a) The findings of fact.[5]

There was no substantial issue of fact before the District Court, virtually all of the material facts having been stipulated by the parties, and most of the matters stipulated having been supported by documentary proof (R. 156-180). The narrative statement of the only testimony in the record consumes less than three pages (R. 198-200), perusal of which discloses that the testimony of this single witness was largely corroborative of the stipulated facts, and was unnecessary and of slight materiality.

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[5]The petitioner took numerous assignments of error to these findings (R. 211-218), Assignments 6-17, and 35.

We do not suggest that the District Court's "findings" should be ignored,[6] except where this Court considers them to be immaterial, unsupported by evidence, or not findings at all. Many of the "findings", it will be seen, are mere conclusions of law as to the meaning and construction of documentary evidence, as for example, that the guilder promise in the contract constituted a money contract, not a commodity contract (R. 134, 254); or that the provisions in regard to optional payment in foreign monies were inserted as an *additional* safeguard against monetary devaluation, *supplementing* the gold clause (R. 134); or that the amounts of foreign monies mentioned in the foreign money options were fixed as the equivalent in value of the United States gold coin of the standard of weight and fineness as it existed January 1, 1912 (R. 134, 252).

(b) The conclusions of law (R. 140-3).

1. The District Court held and concluded as a matter of law that the guilder alternative in these bonds and coupons falls within and is voided by the letter and policy of the Joint Resolution of June 5, 1933, because

(a) The guilder alternative in these bonds and coupons is not an independent alternative of equal rank with the dollar alternative, but is a promise to pay in dollars of the United States of a value as constant as that of gold.

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[6]In their joint brief in opposition to the petition for certiorari, respondents referred to "findings" of the District Court, asserting that the facts so found and left undisturbed by the Circuit Court of Appeals "are not to be ignored" (pp. 6-7).

(b) The Resolution is not confined to gold clauses, but abrogates all alternatives and promises in addition to the gold coin alternative in these bonds.

(c) On June 5, 1933, the bonds and coupons in suit were "obligations payable" in money of the United States, within the meaning of the Joint Resolution, and are thereby required to be paid "dollar for dollar" in money of the United States.

(d) The Court was not bound by *Anglo-Continentale Treuhand, A.G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11 (C. C. A. 2, 1936), cert. den. 298 U. S. 655, where the guilder alternative in this same issue of bonds was held immune from the Joint Resolution.

(e) *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, is inconsistent with and in effect overruled the *Anglo-Continentale* case.

2. The court held that the petitioner's claim on a guilder basis should not be allowed; and it scaled down the claim from the value of the guilders, which the Debtor failed and refused to pay in accordance with its contract, to the nominal dollar amount stated in the gold clause alternatives, which the Debtor never came under a contractual duty to perform for want of an election.

3. The court held that the option for guilders in the bonds and coupons became inoperative when the Joint Reso-

lution was passed and that consequently the election of guilders "was and is wholly ineffective and without any force or effect".

4. In view of the foregoing conclusions, the court decided it was "unnecessary" to pass on the respondents' other objections (R. 143).[7]

DECISION OF THE CIRCUIT COURT OF APPEALS

(R. 246-254; 98 F. [2d] 160)

The Circuit Court of Appeals for the Eighth Circuit, in affirming the District Court, confined its decision to the single question of the effect of the Joint Resolution of June 5, 1933, upon the present claim. It did not attempt to dispose of any of the other issues raised by the respondents, but indicated their lack of substance by saying (R. 247; 98 F. [2d] at 162):

> "The *outstanding controversy* in this court, as in the trial court, is whether these provisions of the deed of trust and of the bonds (including interest coupons) *giving an option of payment in currencies other than American gold dollars* is rendered nugatory by the Joint Resolution of Congress, approved June 5, 1933 . . ."

This sentence, incidentally, is the only one in which the court so much as purported to construe the nature of the alternative contract upon which the present claim is based; and it indicates that the court misconstrued that contract by assuming that the Debtor was under an obligation to

[7]The extensive assignments of error taken by the petitioner are found in R. 211-218.

pay gold dollars ***unless and until*** the option of payment in one of the other specified currencies was exercised. The bonds, as will be seen, did not so provide, but provided for payment in gold dollars only as and if the option to receive such payment should be properly exercised. Apparently the court regarded the only matter before it as one "of the construction of the Joint Resolution" and therefore devoted little or no attention to the construction of the claim itself, which we believe to be equally important, if not decisive.

On the construction of the Joint Resolution, the court recognized as being squarely in point the cases of *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company,* 81 F. (2d) 11 (C. C. A. 2d, 1936) and *McAdoo* v. *Southern Pacific Company,* 10 F. Supp. 953 (N. D., Cal. 1935), holding that the Resolution did not cover multiple currency provisions. It refrained from following those authorities for the astonishing reason that in them the Resolution was held to be "clear and unambiguous."

The court was of the opinion that the word "payable" as used in the Resolution was "crucial" and that, standing alone, it was not susceptible of one single definite meaning. In the language of the Resolution, it was unable to find any satisfactory definition of the word "payable." Searching for the evil sought to be remedied by the Resolution, it found this evil to be the traditional gold clause described in the preamble and in the first section. Turning back to the bonds and coupons in question, the court found that they contained such a gold clause, as well as alternative provisions for the payment of stated amounts in guilders, pounds, francs, or marks.

Thereupon the court reached the single ground upon which its entire decision must rest, stating (R. 252; 98 F. [2d] at 165):

> "The amount of guilders, pounds, francs or marks which might be elected by the obligee was admittedly, determined by the value of the gold dollar as of January 1, 1912."

That was the date as of which the bonds were issued. It was for this reason alone that the court held that the guilder alternative in these bonds had the same prohibited effect as a gold clause and was therefore unenforceable. Though recognizing that the multiple currency provisions may have been inserted in the bonds pursuant to "an entirely proper business purpose", the court nevertheless said the effect, not the purpose, controlled, and that "the effect is to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912" (R. 252; 98 F. [2d] at 165). The remainder of the opinion, dilating on the assumed "advantage" or "premium" that would result to the bondholders by "running around an international stump—passing through Holland en route", is predicated upon the erroneous hypothesis that the guilder claim was the legal and factual equivalent of a claim for gold or gold coin, based upon a traditional gold clause.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals and the District Court erred in holding that the claim for guilders, or the dollar value thereof at the applicable exchange rate, is barred by the Joint Resolution of June 5, 1933, 48 Stat. 112

SUMMARY OF ARGUMENT

I. The claim in controversy is based exclusively upon an absolute and independent contract to pay guilders in Holland.

II. The Joint Resolution of June 5, 1933, does not affect the contract of the Debtor in these bonds and coupons to pay guilders or the option to receive payment of guilders in Holland.

III. Any construction of the Joint Resolution so as to reach the guilder option in these bonds and coupons would render the Resolution unconstitutional.

I

THE CLAIM IN CONTROVERSY IS BASED EXCLUSIVELY UPON AN ABSOLUTE AND INDEPENDENT CONTRACT TO PAY GUILDERS IN HOLLAND.

A correct understanding of the nature of the claim in suit is, we believe, decisive of this controversy. The Debtor contracted in these bonds and coupons to pay guilders in Amsterdam, Holland. After all conditions precedent had been satisfied and the bonds and the applicable coupons for interest had fallen due, the Debtor failed and refused to perform its contract, though formal demand was made upon it at the designated place of payment. The present claim is simply one on behalf of the holders of 5,636 bonds and coupons for damages resulting from this breach of contract by the Debtor. The petitioner asserts no other claim.

As we see it, therefore, the only issue before this Court is whether such a claim for damages for breach of a foreign money contract, executed in 1912, is prohibited or diminished by the Joint Resolution of June 5, 1933. The respondents in their brief in opposition to the petition for certiorari, said with regard to this issue that it

> "relates to an agreement payable solely in guilders in Holland, and we have no difficulty in joining with the petitioner in answering it 'No'."[8]

That admission would seem to leave no issue for the Court to decide.

Neither of the courts below squarely determined that a contract payable solely in guilders in Holland falls within the condemnation of the Joint Resolution. To the contrary, the conclusions of law of the District Court (R. 140-3) and the opinion of the Circuit Court of Appeals (R. 24- 254), though not expressly deciding the point, clearly implied, by holding that the petitioner's claim was not based on such a contract, that a contract to pay guilders in Holland would be valid and fully enforceable. The primary issue, therefore, is whether petitioner's claim is based upon a contract to pay guilders, which would be valid, or whether

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[8] This statement at page 7 of respondents' brief was made with specific reference to Question No. 1 at page 2 of the petition, which was—

> "1. Does the Joint Resolution of June 5, 1933 (48 Stat. 112), abrogating 'gold clauses' annul a negotiable contract executed in 1912 by the Debtor wherein it agreed to pay to the holder of the instrument a stated number of Dutch guilders at Amsterdam, Holland?"

it is founded on some other contract, condemned by the Joint Resolution.

The bonds and coupons, the instruments wherein are set forth the contracts for guilders upon which the petitioner relies, also contain gold clauses. It was the presence of the gold clauses in these bonds and coupons that defeated the petitioner's guilder claim below. Neither the District Court nor the Circuit Court of Appeals could distinguish between the petitioner's claim on the guilder contract and the gold clause, which, as we shall see, never became operative, was never relied upon by the petitioner, and is and has always been legally separate and distinct from the guilder contract.

We readily concede that the Joint Resolution would prohibit the enforcement of the gold clauses in these bonds and coupons, should any one attempt to enforce them. But no one, least of all the petitioner, has ever attempted to enforce those clauses. We contend that the physical inclusion of the gold clause in the instruments evidencing the contracts sued on is wholly immaterial because the guilder contract, which is the basis of this action, is just as independent and distinct from the gold clause and just as enforceable as though the two were contained in entirely separate instruments.

A. Each of the alternative promises contained in these instruments is complete in itself and independent of the other, except that all the alternatives are mutually exclusive.

Although the bonds and coupons, or instruments upon which the present claim is founded, contain five promises, these promises are all stated in the alternative, so that no

one of the alternatives is dependent upon any other, except in so far as the election or acceptance of one would perforce relieve the Debtor from any duty of performing the others. This becomes apparent upon reference to the instruments themselves.

In the form of coupon bond incorporated in the Mortgage (R. 19, 130) the Debtor promises to pay at maturity

> "One thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912 *or* in London, England, £205 15s 2d, *or* in Amsterdam, Holland, 2490 guilders, *or* in Berlin, Germany, marks 4200, D.R.W., *or* in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, ... Payment of the principal and interest on this bond will be made, at *the holder's option*, at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or at designated offices in the foregoing cities and countries above mentioned."

The promises to pay interest in the coupons are substantially similar in form (R. 22, 131).

The promises are true alternatives. No one of the promised currencies of payment is primary and none is subordinate. Each of the promises is subject to the identical contingency or condition precedent: *viz.*, election of the place and currency of payment by or on behalf of the holder. The words "at the holder's option" precede the designation of the places that govern the currency of payment. The holder must elect; he cannot receive payment in more than one currency; and, upon the election of one

alternative, the Debtor's duty to pay in a particular currency at the particular place becomes fixed, thus automatically and permanently relieving the Debtor of any duty or liability in respect of the other four alternative promises. These plain truths regarding the alternatives in these bonds and coupons should require no further elaboration; the meaning and effect of the instruments is plain and unambiguous.

The contention will be made that the foreign money alternatives were intended for the benefit of aliens only, and not of citizens, and that most of the bondholders whom the petitioner represents are Americans. No indication of such an intent can be found within or outside of these instruments. The bonds were sold to an original group of American purchasers (R.. 132-4) whose attention was specifically called to the fact that they were payable in foreign currencies, at the election of the holder (R. 133-4, 160). There is no indication in the terms of the bonds and coupons, and there was no suggestion to purchasers at the time of sale, that the holder could receive payment only in the currency of his domicile. Although it is true that many of these bonds were subsequently sold abroad and are now held by foreigners (R. 135, 198), there is no reason to suppose that an Englishman could elect payment only in pounds, a Dutchman only in guilders, etc. It is clear from the instruments that, just as a Dutchman is free to choose dollars instead of guilders, so an American holder has an absolute right, at his election, to receive payment in guilders.

Inasmuch as the bonds themselves are unambiguous and give no one alternative precedence over the other in legal effect, resort to extraneous material in an attempt to prove that the bonds and coupons are primarily dollar obligations

is not warranted. The respondents have heretofore emphasized that the bonds were issued in 1912 to an original group of purchasers in America who paid dollars therefor (R. 132, 160), that the proceeds were expended in this country (R. 133, 160-3), that a substantial amount of the bonds was held by American citizens in 1935 (R. 135), that before 1933 the coupons for *interest* on the bonds had been regularly paid in American dollars, and that the Debtor had never maintained any office or agency in any of the four countries named in the bonds, for the payment of the foreign money promises (R. 134). The significance of these facts is purely historical. Even if it were permissible to disregard the terms of the plain and unambiguous contract in these bonds for the payment of foreign currencies, the foregoing facts would have little or no probative force. It is not contended that the Debtor never intended to pay the bonds in the foreign currencies promised when the bonds were issued; it is not contended that any of the foregoing facts or circumstances were sufficient to constitute a waiver or estoppel, so as to eliminate the foreign money alternatives from the bonds and coupons.

The amount of 2,490 guilders on the face and in the text of each bond is no less fixed, absolute and independent than is the amount of $1,000 alternatively promised in the same bond. No reference to the Mortgage Indenture or to historical data can alter the fact that in these bonds the Debtor promises to pay "at the holder's option" stated amounts in five designated currencies, which are connected with the word *or* and thus made *disjunctive* obligations, mutually exclusive. The words "at the holder's option" in the text of the bond precede *all five* places of optional payment, including the place where dollars are to be alterna-

tively paid. While the respondents below pointed to a clause in the Mortgage Indenture alleged to be slightly different,[9] the unmistakable language of the bonds must in any event prevail, particularly in view of the fact that this language is textually set forth in the Indenture (R. 19) and in view of the further fact that the covenant in the Indenture is to pay the bonds "at the dates and the places and in the manner mentioned in such bonds . . . according to the true intent and meaning thereof" (R. 59). A fundamental error of the courts below was their failure to recognize clearly the perfect equality of the five options in these bonds and coupons, and their tendency to consider the dollar option as the primary medium of payment which would govern if no foreign currency option was effectively exercised. Both the District Court (R. 141) and the Circuit Court of Appeals (opinion quoted at p. 14 above) fell into this error.

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[9]This is Article First, Section 4 of the Mortgage providing that the coupon bonds

> "shall be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or, at the option of the holders of said coupon bonds, in the cities and countries, respectively, and in the respective currencies stated in the form of coupon bonds hereinbefore set forth [*i.e.*, that quoted at p. 20 above], but the face amount of each of such coupon bonds shall be $1,000 in United States gold coin of the standard of weight and fineness existing on January 1, 1912, or the equivalent thereof, calculated at the rates of exchange stated in the form of coupon bond hereinbefore set forth."

It cannot reasonably be contended that the effect of this language is to make the dollar alternative primary and subordinate thereto the foreign currency alternatives, since the language does not require such an inference and the contrary statement in the bonds themselves is clear and unmistakable.

As a matter of law it is a plain misconstruction of the instruments.

B. The guilder alternative in these bonds is not the equivalent of or a substitute for the gold clause alternative.

The effect of the multiple currency provisions in these bonds is no more "to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912", as the court below held (R. 252; 98 F. [2d] at 165), than it is to fix the unit of payment as of the value of the paper dollar of the same date. The paper dollar and the gold dollar of January 1, 1912 were identical in value, and mutually exchangeable. Nevertheless, as we have seen (pp. 12, 16 above), the Circuit Court of Appeals and the District Court stake their decisions upon the ground that the foreign money alternatives in these bonds were identical with and the equivalent of the gold coin alternative, also in the bonds, because Article First, Section 4, of the Mortgage Indenture provided (R. 39) that as of January 1, 1912 the amounts of the foreign currencies alternatively promised should be "the equivalent" of $1,000 in the gold coin of the United States of that same date. We are compelled to assume, because of the undue emphasis placed upon the word "gold", that the courts below would not have held the guilder alternative to be the equivalent of the gold clause alternative if the amount of guilders stated in the bonds had been fixed in 1912 as the equivalent of one thousand paper dollars.

Yet it cannot reasonably be said that because the draftsman of the Mortgage Indenture calculated the rates of exchange for the multiple currency clauses on the basis of

the *gold* dollar of 1912, the guilder option, if exercised today, is the equivalent of a promise to pay gold coin of the United States of the standard of weight and fineness as it existed on January 1, 1912. Some one currency had to be selected as the basis for calculating the rates of exchange for the purpose of control and to prevent an over-issue of bonds. Inevitably, the dollar was so chosen because it was the currency of the Debtor's residence. The very fact that the alternative amounts were fixed so as to be equivalent in value as of a certain date indicates that the Debtor foresaw the possibility of wide *subsequent* fluctuations and discrepancies in the value of the alternative amounts, such as to raise the possibility of an over-issue. Certainty of equivalence as to the five alternative amounts could not survive the execution of the mortgage. Any equivalence thereafter would be fortuitous and beyond the control of the parties. Foreseeing the possibility of wide subsequent fluctuations, the Debtor yet undertook in unmistakable terms to be bound by the consequences measured by the fair exchange value of the foreign currencies in dollars, if it could not or preferred not to pay any foreign currency elected.

At this point the error of the Circuit Court of Appeals becomes susceptible of mathematical demonstration. In its opinion that court said (R. 252, 98 F. [2d] at 165):

> "The amount of guilders, pounds, francs or marks which might be elected by the obligee was, admittedly, determined by the value of the gold dollar as of January 1, 1912. The only effect of stating the precise amounts in those foreign currencies was to make definite and certain what might have been expressed as 'guilders, pounds, francs or marks which would be the equivalent of their values on

> January 1, 1912, as measured by the value of one thousand gold dollars of the weight and fineness as of that date.' "

That the Circuit Court was wrong in finding the foreign currency options to be a gold equivalent is readily seen if we take the French franc option as a test. The exchange equivalent of the French franc in terms of the January 1, 1912 gold dollar was 19.2948 cents, and accordingly the French franc alternative was fixed in the coupon bond as 5180 francs (R. 19, 39). Since January 1, 1912, the dollar has been devalued once, and the franc several times. The dollar, which in 1912 was 25.8 grains of gold, nine-tenths fine, is now 15 and 5/21 grains of gold, nine-tenths fine. The franc, which in 1912 was worth 19.2948 cents, is now worth 2.65 cents of the present dollar or 1.56515 cents of the 1912 dollar.[10] Thus the number of francs which (in the words of the Eighth Circuit Court of Appeals)

> "would be the equivalent of their values on January 1, 1912, as measured by the value of one thousand gold dollars of the weight and fineness as of that date"

is 63,891.64 francs, not the 5,180 francs specified in the bond; and the Circuit Court's conclusion that the foreign currency amounts specified in the bond are the necessary equivalent of one thousand 1912 gold dollars is completely and basically erroneous.

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[10]The authorities are Act of March 14, 1900, 31 Stat. 45; Gold Reserve Act of 1934, 48 Stat. 337; Presidential Proclamation of January 31, 1934; New York Times January 13, 1939, Foreign Exchange quotations, p. 22; Handbook of Foreign Currency and Exchange (United States Department of Commerce 1930), p. 70; Tate's Modern Cambist (1922), p. 249.

The guilder option was not a "gold" contract when it was inserted in the bonds and coupons in 1912, and has not been a "gold" contract at any time thereafter. The stipulated evidence and the findings of fact of the District Court based thereon leave no doubt as to the relation to gold which the Dutch guilder has had at all times (R. 137-140, 165-7). It is conceded that the holder of guilder notes has never been entitled to claim either gold or gold coin from the Central Bank of Holland; that the Central Bank of Holland has never been known to redeem its notes in gold; but that prior to September 27, 1936, when Holland went off gold, the Central Bank delivered gold for export, whenever the exchanges on countries maintaining a market for gold reached gold export point. A promise to pay guilders is no more a "gold" promise than a promise to pay present-day dollars would be. Though both guilder and dollar notes are based on gold, neither is redeemable in gold.

The Debtor and the petitioner, as its corporate trustee, clearly understood that the obligation of the Debtor with respect to the guilder payments would be measured by an ordinary banker's rate of exchange. The Debtor deliberately took the risk of that exchange; that is, that the dollar would stay on gold as long as the guilder. In a letter to Guaranty Trust Company of New York, dated March 25, 1912, with reference to coupon payments in Amsterdam, the Debtor said "the foreign exchange necessary in the transaction is to be furnished by you at a fair current rate" (R. 172).

Clearly then, the Debtor understood its liability under the guilder alternative in these bonds and coupons to be no different from any liability it would assume in a simple contract for the payment of a stated number of guilders in

Holland. The fact that the original amount of guilders promised happened to have been calculated at the prevailing rate of exchange on January 1, 1912, and the fact that the bonds contain an alternative promise to pay gold coin of the United States, as well as a promise to pay guilders, were immaterial in the Debtor's own opinion. The guilder alternative in these bonds, therefore, can be the equivalent of a promise to pay gold, gold coin or money of the United States measured thereby only if a straight contract to pay guilders would also constitute such a gold clause. There can be no difference in legal effect between a straight contract to pay guilders and an alternative contract to pay guilders. As already shown (pp. 11-16, 18 above), both of the courts below were careful not to hold that a straight contract to pay guilders constitutes a promise to pay gold or gold coin within the Joint Resolution, and the respondents have conceded that such a contract would not be touched by the Joint Resolution.

The law is clear that a contract to pay guilders in Holland, whether it be in alternative or absolute form, is not the equivalent of a gold clause or a contract to pay in money of the United States measured by gold. The relative values of the currencies of different nations have been traditionally governed, not by gold, but by the cost of shipping gold or the gold export point. Accordingly, it has been held that a contract to pay guilders is valid and enforceable and is radically different from a contract to pay gold or gold coin or money of the United States measured thereby. This was the decision in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11 (C. C. A. 2nd, 1936), cert. den. 298 U. S. 655, where the

court said, in upholding the guilder alternative in these bonds:

> "As has been seen, the coupons contained alternative promises; the holder might demand gold dollars, pounds, guilders, marks or francs at his choice. *If he chose any of the foreign currencies he could not get gold; he must be content with whatever the money of the country might be on the due date;* it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible', not exchangeable for anything at all. When for example France and Germany and England went off the gold standard the defendant was relieved *pro tanto,* as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. *If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt.*"

So, also, in *McAdoo* v. *Southern Pacific Company,* 10 F. Supp. 953 (N. D., Cal., 1935); reversed solely on jurisdictional grounds 82 F. (2d) 121 (C. C. A. 9th, 1936), the court said in holding that foreign money alternatives were not nullified by the Joint Resolution (p. 954):

> "Congress [in the Joint Resolution] was dealing with contracts calling for payment in gold coin of the United States, not with contracts payable in money of foreign countries."

The court further observed (p. 955):

> "But clearly the money of foreign countries is a commodity and on the same footing as other com-

> modities . . . Guilders and francs are dealt in upon the exchanges of the country, as are securities, grains, and other chattels. They have a well-established current value in terms of money of this country."

There is no conflict in the authorities with respect to the precise holdings in the *Anglo-Continentale* and *McAdoo* cases to the effect that a contract to pay guilders is not the equivalent of a gold clause prohibited by the Joint Resolution.

The foregoing authorities merely apply to bonds and coupons containing multiple currency options the settled doctrine that a contract to pay the money of a foreign country must be recognized as a contract calling for the payment of money in so far as it is to be performed or enforced in the foreign jurisdiction, and a contract for the delivery of a commodity in so far as it is to be performed or enforced in this country. In neither case can such a contract be treated as a contract for the payment of gold, gold coin of the United States, or money of the United States measured thereby. In the Conflict of Laws Restatement, Section 423, *comment a* the rule is stated:

> "A contract to deliver foreign money is really a contract to deliver a commodity and the measure of damages is the same as for the breach of a contract to deliver a chattel."

This principle is recognized in New York, where the bonds in question were issued and delivered. *Richard v. American Union Bank*, 253 N. Y. 166, 174 (1930).

Guilders are lawful money in Holland (R. 137) and a contract to pay guilders in Holland must be regarded as a

courts as valid and enforceable, regardless of currency fluctuations. This Court so held in *Deutsche Bank v. Humphrey*, 272 U. S. 517, 519:

> "An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. Legal Tender cases, 12 Wall. 457, 548, 549. Obviously, in fact a dollar or a mark may have different values at different times but to the law that establishes it it is always the same."

The rule in New York is the same. In *Richard v. American Union Bank*, 241 N. Y. 163, 167 (1925), the Court said with reference to a contention that the market value of Roumanian lei had declined in Roumania:

> "During all the times in question lei continued to be the same monetary unit and plaintiffs obtained on the deferred date the same number of lei to which they were entitled on the due date and it is impossible to say that lei, measured by lei, had declined in market value."[11]

It is thus perfectly clear that a contract for the payment of foreign money in a foreign country, whether viewed

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[11] See generally to the same effect:

- *Hicks v. Guinness*, 269 U. S. 71, 80;
- *Tillman v. Russo-Asiatic Bank*, 51 F. (2d) 1023, 1025 (C. C. A. 2d, 1931);
- *Wichita Mill v. Naamlooze Industrie*, 3 F. (2d) 931, 933 (C. C. A. 5th, 1925);
- *Equitable Trust Co. v. Keene*, 232 N. Y. 290, 294 (1922);
- *Cash v. Kennion*, 11 Vesey Jr. 314; 32 Eng. Rep. 1109 (1805);
- 22 Col. L. Rev. 217, 235 (1922).

from the standpoint of this country as calling for the delivery of a commodity, or the standpoint of the foreign country as calling for the payment of money, is not a contract for the payment of gold, gold coin, or money of the United States measured thereby.

C. The invalidity or unenforceability of the gold coin alternative in these bonds and coupons can in no way affect or detract from the validity of the remaining alternatives.

Even if the gold coin alternative in these bonds and coupons was intended to be primary, even if the foreign money alternatives in the same instruments were intended to be the equivalent of the gold coin alternative, as we have seen was not the fact, still the validity of the foreign money alternatives would in no way be dependent upon the validity of the gold coin alternative. Such a conclusion is compelled by the well-known doctrine that the invalidity or impossibility of performing one alternative in a contract, where the parties are not at fault, furnishes no legal excuse for not performing the remaining alternatives. In such a situation it becomes immaterial whether the void alternative was primary, co-ordinate, or secondary; it is of no consequence that the parties intended the alternatives to be mutually equivalent. The rule is stated as follows in 6 Williston on Contracts (Rev. Ed. 1938) § 1779, pages 5060-1:

> "*Where some things promised are illegal and some legal, the latter may be enforced if consideration is legal.*
>
> It was early decided that where some covenants of an indenture are legal and others illegal the legal coveniants may be enforced. This is the simplest

form of the problem of partly illegal contracts. If legal consideration has actually been given and a unilateral contract formed, or if the promises are under seal and binding without consideration, the rule thus early established has never been questioned. For the same reason where one of two things is promised in the alternative, and one is lawful and the other unlawful, the lawful promise may be enforced. But a qualification must be added to the broad statement of the rule. If the whole transaction was for an illegal purpose, or probably if the illegal covenants showed gross moral turpitude, the other covenants, though in themselves perfectly legal, would not be enforced."

The qualification of the general rule, as stated by Professor Williston, has no application here, inasmuch as the issuance of these bonds was concededly for a legitimate purpose and the bonds in their entirety were undoubtedly lawful when issued. Thus, the fact that some twenty years after their issuance, the gold coin alternative therein was declared by Congress to be against public policy, finds no parallel in those cases where one alternative in the contract was void at its inception and the contract was made with an illegal or immoral purpose. Illustrative of the exception to the general rule that one alternative in a contract is not affected by the invalidity of another are certain cases holding that, where one of two alternatives is void *ab initio* under the statute of frauds and is inseparable from the other alternative, the contract is void in its entirety. *De Beerski v. Paige*, 36 N. Y. 537 (1867). Even in the statute of frauds cases, where one alternative was clearly void at its inception, the authorities are not in agreement as to whether the remaining alternatives are affected. See the

cases collected in 13 A. L. R. 271-274.[12] Another illustration of a possible exception to the general rule is found in *Johnson* v. *Joyce*, 90 Minn. 377, 97 N. W. 113 (1903). In that case an alternative contract for the payment of wheat was held unenforceable and void (1) because there was no consideration to support it, and (2) because it was made *for the express* purpose of evading the usury statute. These and other authorities wherein contracts which are partly illegal were held to be unenforceable in their entirety, were urged by the respondents in the courts below. None of them, however, involve contracts, such as the bonds and coupons here, which were valid in their entirety when made and which were issued for a perfectly legitimate business purpose.

The courts below were undoubtedly influenced in their decisions by the knowledge that the gold clause in these bonds was stricken down by the Joint Resolution of June 5, 1933. Although neither court stated in so many words that the invalid gold clause nullified the entire contract in these instruments, nevertheless they both reached the same result by holding that the foreign currency alternatives were the equivalent of or a substitute for the gold clause in the bonds and, therefore, dependent on it. Thus, the Circuit

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[12] It is significant that in every case collected in this annotation where an alternative contract was held void in its entirety because one of the alternatives was void at its inception as falling within the statute of frauds, the *obligor* had the power of electing which of the two alternatives he would perform. This furnishes another material distinction between the statute of frauds cases and the alternative promises contained in these bonds. In other words, the obligor, if he has the power to elect, might elect the void or illegal alternative, thus relieving himself from any duty or liability with respect to the valid or legal alternative.

Court of Appeals, because the amount of the foreign currencies "was, admittedly, determined by the value of the gold dollar as of January 1, 1912", concluded (R. 253; 98 F. [2d] at 165):

> "Hence, the holder is secured from depreciation of the gold dollar not only by a gold clause provision but by a four-fold further assurance in these foreign currencies of values based on the specified gold dollar."[13]

As we have observed, however, neither Court held that the promise to pay guilders, if standing alone, would have been affected by the Resolution; they predicated their decisions wholly upon the facts (1) that the bonds contained an invalid gold clause, and (2) that on January 1, 1912, the amounts promised in each of the foreign money alternatives were the equivalent in value of the amount promised in the gold clause alternative.

Not only are these two factors immaterial, for reasons already given (pp. 19-32 above), but they are also immaterial because of the doctrine of law that the invalidity of one alternative cannot impair the contract contained in the remaining alternative.

If these bonds had been issued after the passage of the Joint Resolution of June 5, 1933, then the question whether the foreign money alternatives were inserted in

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[13]The District Court took a similar view, stating among other things, in its Conclusion of Law No. 9 (R. 142):

> ". . . the alternative forms of payment in the Bonds here involved shed light upon each other; the obligations require the payment of money and not the delivery of a commodity; . . ."

See also Conclusion of Law No. 10 (R. 143).

the instruments for the purpose of evading the Joint Resolution, by attempting to provide for "a four-fold further assurance in these foreign currencies of values based on the specified gold dollar" (R. 253), might become relevant. This, however, was not the fact. It cannot be that there was any original vice in calculating the foreign currency amounts with respect to the value of the gold dollar prior to the issuance of the bonds in 1912; or that there was any unlawful or immoral purpose in including a gold clause in these instruments when they were issued in 1912. At that time, the gold dollar was the legal standard of monetary value in the United States,* and good business practice favored the use of that standard as a monetary measure in all contracts calling for payment in money. It was a practice expressly sanctioned by the decisions of this Court: *e.g., Bronson* v. *Rodes,* 7 Wall. 229, 250 (1868). This being so, the subsequent invalidity of the gold coin alternative in these bonds can have no adverse effect upon the enforceability of the other alternatives. Each alternative must be tested as a single contract and must either stand or fail alone.

That the cases dealing with alternatives that are void *ab initio* or that are made pursuant to an unlawful purpose are inapplicable where the entire contract was valid at its inception was expressly noted in *Irvine* v. *Postal Telegraph-Cable Co.,* 37 Cal. App. 60, 66, 173 Pac. 487 (1918). There one of two alternatives in a contract was held to be enforceable, even though performance of the other had been made illegal by statute after the execution of the contract. In distinguishing those cases where the contract is illegal at inception, the court said at page 66:

> "The rule that, where parties to an illegal contract are *in pari delicto,* the court leaves them as it finds them, does not apply in the present case, where the contract was a legal, just and equitable one when made, but which has become unlawful in part by subsequent legislation."

Thus in *Rosenthal* v. *Perkins,* 123 Cal. 240, 50 Pac. 804 (1878), the promise of the debtor in an attachment bond to return the attached property to the creditor was held void because of the debtor's subsequent bankruptcy, but the sureties on the bond were nevertheless held to the alternative promise to pay the value of the property.

Even if one of the alternatives is originally illegal, the other alternative will be enforced if the two are not so mingled and bound together, by wrongful purpose, or otherwise, that they cannot be separated. A striking illustration of such a case is *Hanauer & Co.* v. *Gray,* 25 Ark. 350; 99 Am. Dec. 226 (1869), where action was brought on a promissory note "payable in Confederate bonds or Tennessee money". The promise to pay Confederate bonds was held to be illegal, but the alternative providing for payment in Tennessee money was held legal and enforceable, the court saying (p. 352):

> ". . . the promises are not so mingled and bound together that they cannot be separated."

Thus the Restatement on Contracts, Section 344, Comment (b), holds that the valid alternative is enforceable, irrespective when the other alternative became illegal:

> "If before breach all the alternatives but one are eliminated by impossibility, illegality, or otherwise,

the contract ceases to be an alternative one; and damages for breach are measured according to the single performance now required."

It is significant that illegal alternatives are placed in the same category in the foregoing statement as alternatives that become impossible of performance. The rule regarding the impossibility of one alternative (including supervening illegality) is given in the Restatement on Contracts, Section 469, as follows:

"Impossibility of performing one or more but less than all of a number of performances promised in the alternative in a contract discharges neither the duty of the promisor if by the terms of the contract he had the privilege of choice, nor the duty of the promisee if he had that privilege, but merely destroys or limits the possibility of choice; except where a contrary intention is manifested or the impossibility exists at the time of the formation of the contract and there is such a mistaken assumption of the existence of a fact as renders the contract voidable under the rule stated in § 502."

In 6 Williston on Contracts (Rev. ed. 1938), § 1961 at page 5504, the rule is given:

"Where a contract provides that one of two alternatives shall be performed by the promisor, the fact that one alternative is, or becomes, impossible does not excuse the promisor from performing that which remains possible. . . . ."

In *Yankton Sioux Tribe of Indians* v. *United States*, 272 U. S. 351, this Court held the Government bound to per-

form the remaining alternative in its contract with the Sioux Tribe, although the first alternative was impossible of performance (p. 358),

> ". . . in virtue of the principle that, where promises are in the alternative, the fact that one of them is at the time, or subsequently becomes impossible of performance does not, at least without more, relieve the promisor from performing the other."[14]

Accordingly, the guilder alternative in these bonds and coupons is in no way affected by the fact that on June 5, 1933, some twenty years after the issuance of the bonds, the gold coin alternative was declared to be against public policy and thus became illegal and impossible to perform. Unless the Joint Resolution, invalidating the gold clause alternative, contains some affirmative provision to the contrary, the only effect of the nullification of the gold clause was to strike it from the bonds and coupons, leaving them with four, instead of five, valid and legally enforceable alternative promises.

D. The claim of the petitioner is either based on a single non-alternative contract to pay guilders or else there is no contract at all.

The question whether the petitioner had the authority to elect guilders on behalf of those bondholders who had

[14]See to the same effect *Board of Education* v. *Townsend*, 63 Ohio St. 514; 59 N. E. 223 (1900); *Independent Gas & Oil Co.* v. *Stephenson*, 80 Utah 531, 15 P. (2d) 317 (1932); *Drake* v. *White*, 117 Mass. 10 (1875); *State* v. *Worthington*, 7 Ohio Rep. 171 (1835); *Chappell* v. *McMillan*, 15 N. M. 686, 113 Pac. 611 (1911); 6 R. C. L. 1015, Sec. 376.

not made their own elections, was not passed on by either of the courts below, although it was raised by the respondents. The District Court, in holding that the claim was barred by the Joint Resolution, stated that it was "unnecessary" to determine any other issue raised by the respondents (R. 143), and in conclusion of law No. 6 it held that any election made after the passage of the Resolution "was and is wholly ineffective and without any force or effect" (R. 142).

Petitioner cited authorities below tending to establish its right as mortgage trustee to act for bondholders too widely scattered and too poorly informed to make an election themselves.[15] In view of the failure of the lower courts to make findings on this point, we have not deemed ourselves justified in arguing the point in this Court. The

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[15]**The authorities cited by petitioner below on this point were *Rogers* v. *United Grape Products*, 2 F. S. 70, 71; *Guaranty Trust Company* v. *Henwood*, 86 F. (2d) 347, certiorari denied 300 U. S. 661; *Bankruptcy Act*, § 77(c)(7); *In re International Match Corporation*, 3 F. S. 445; *In Re United Cigar Stores Co.*, 68 F. (2d) 895; *In Re Paramount Publix Corporation*, 72 F. (2d) 219; *Lane* v. *Equitable Trust Co.*, 262 F. 918, certiorari denied 252 U. S. 578; *Continental Equitable Title & Trust Co.* v. *National Properties Co.*, 273 F. 967; *McClelland* v. *Norfolk Southern R. Co.*, 110 N. Y. 469; *Restatement Trusts*, § 186, Comment (d); *Pomeroy Equity Jurisprudence* (4th ed.), Vol. 3, p. 2428; *New York Trust Co.* v. *Michigan Traction Co.*, 193 F. 175; *Old Colony Trust Co.* v. *City of Wichita*, 123 F. 762, affirmed 132 F. 641; *Marshall & Ilsley Bank* v. *Guaranty Inv. Co.*, 213 Wis. 415; *State* v. *Comer*, 176 Wash. 257, appeal dismissed 292 U. S. 610; *Frishmuth* v. *Farmers Loan & Trust Co.*, 95 F. 5, affirmed 107 F. 169; *Farmers Loan & Trust Co.* v. *Central Railroad of Iowa*, 8 Fed. Cas. No. 4663.**

olding below that any election of guilders was barred by ne Joint Resolution of June 5, 1933, entitles us to assume or purposes of review in this Court that, but for the oint Resolution, the election of guilders was properly made y the petitioner and was binding as to bondholders who nade no election on their own behalf, after publication of otice by the petitioner that it proposed to elect guilders or them (R. 177). Respondent conceded that petitioner's ormal demand for guilders and the protest for non-payment were made in Holland in accordance with Dutch law R. 159, 173-6), and the District Court so found (R. 137).

Unless there was a valid election of one of the five lternative currencies promised in the bonds, no obligation f payment by the Debtor in any currency would have as et matured in respect of the bonds and coupons in suit. As explained in *Comment a* of the Restatement on Contracts, § 325 (2):

> "A contract may give an option either to the promisor or to the promisee. If the option is given to the promisee his exercise of the option is a *condition precedent* to any duty of immediate performance on the part of the promisor (§§ 263, 264), and on performance of the condition the contract is no longer alternative. . . ."

In other words, the five alternatives, as originally contained in the bonds and coupons, were not obligations of ayment, but were merely unexercised options or irrevocble offers by the Debtor. Until one of these options was ccepted or exercised by or on behalf of the promisee, in hom the choice resided, the Debtor was under no con-

tractual duty to make payment in any currency; and until such election, the Debtor's only contractual duty was to keep the offers open. See Restatement on Contracts §§ 24 and 27. Accordingly, either the petitioner made a valid election of guilders and has an enforceable claim for guilders on behalf of those bondholders whom it represents, or there has been no election whatsoever of any of the alternative currencies of payment, with the result that the Debtor has not incurred any contractual duty to pay in any currency, whether it be dollars or guilders.

Because of the fact that the election of one alternative in an alternative contract is a condition precedent to the ascertainment of the duty to perform, it follows that upon such an election, the contractual duty thereby fixed is single and not alternative, just as though the contract had originally provided for only that performance which was elected. Thus, in § 344 of the Restatement on Contracts it is provided that:

> "The damages for breach of an alternative contract are determined in accordance with that one of the alternatives that is chosen by the party having an election . . ."

It is explained in *Comment d* under this section that in those situations where the promisee, and not the promisor, has the election, there can be no breach until this power of election has been exercised. *Comment d* to § 344 reads:

> "If the power to elect between alternative performances is in the promisee and not in the party who is to perform them, *there can be no breach until after he has made his election.*"

Comment a under § 344 of the Restatement on Contracts further explains that, in cases where the choice between the alternatives resides in the promisee, on notice of the election made by the promisee ". . . the contract ceases to be an alternative one, and damages for breach will be measured *just as if the contract had never been in the alternative.*"

Illustrations of the application of the foregoing principles are numerous and varied. Thus, the election of the place of performance of an alternative contract ordinarily determines the medium of performance and the law applicable thereto. Restatement of the Law of Conflict of Laws, §§ 356(1) and 364. So also an alternative contract, one alternative calling for the payment of money and another calling for some other method of performance, may nevertheless be negotiable if the right to elect between the alternatives is given to the holder of the promissory instrument. N. I. L. § 5(4). The reason for this rule is that if the holder elects the money alternative, the instrument becomes one for the payment of money and nothing else.[18]

Still another illustration of the rule is found in fire insurance contracts where the insurance company reserves the option to rebuild the premises instead of compensating the insured in money. The authorities hold that upon the

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[18] See

Hodges v. Shuler, 22 N. Y. 114 (1860);
Hosstater v. Wilson, 36 Barb. (N. Y.) 307 (1862);
Sandlin v. Maury National Bank, 210 Ala. 349, 98 So. 190 (1923);
Pratt v. Higginson, 230 Mass. 256, 259; 119 N. E. 661, 663 (1918).

election of the insurer to rebuild the premises, the contract is converted from an insurance into a building contract."[17]

A corollary to the rule that the election of one alternative reduces an alternative contract to a contract calling for a single performance is that the election by the party having the choice is ordinarily final and irrevocable. See *Twaits v. Pennsylvania R. R. Co.*, 77 N. J. Eq. 103, 110, 75 Atl. 1010, 1013 (1910), where the court said:

> "Broadly stated, the law in respect to alternative rights or provisions under contracts is that the party having the right of choice, when he has once elected, is concluded thereby."

To the same effect are *Dimmick* v. *Banning*, 256 Pa. 295, 301, 100 Atl. 871, 873 (1917); 13 C. J. pages 629, 630.

These principles governing the law of alternative contracts were applied in the case of *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Ry. Co.*, 81 F. (2d) 11 (C. C. A. 2, 1936), certiorari denied 298 U. S. 655, where the court held with reference to the option of the holder in these very bonds:

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[17] *Morrell* v. *Irving First Ins. Co.*, 33 N. Y. 429, 449 (1865);
Beals v. *The Home Ins. Co.*, 36 N. Y. 522, 527 (1867);
Heilmann v. *Westchester Fire Ins. Co.*, 75 N. Y. 7, 9 (1878);
Wynkoop v. *Niagara Fire Ins. Co.*, 91 N. Y. 478 (1883);
Rubber Trading Co. v. *Manhattan Rubber Mfg. Co.*, 221 N. Y. 120 (1917);
Globe & Rutgers Ins. Co. v. *Prairie Oil & Gas Co.*, 248 Fed. 452, 456 (1917);
Cussler v. *Fireman's Ins. Co.*, 194 Minn. 325, 327, 260 N. W. 353, 355 (1935).

"*If he chose any of the foreign currencies he could not get gold; he must be content with whatever the money of the country might be on the due date;* it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible', not exchangeable for anything at all."

Furthermore, the court expressed disapproval of the decision of the majority of the court in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. (N. Y.) 634, rendered in disregard of the principle that, upon presentment of the coupon with multiple currency options in Holland, the contract became a single obligation for the payment of guilders. The conclusion of the Circuit Court of Appeals for the Second Circuit has just been adopted by the New York Court of Appeals in *Zurich General Accident & Liability Insurance Company, Ltd.* v. *Bethlehem Steel Company,* which thereby overruled the conflicting decisions below.[18] The opinion in the *Zurich* case is a brief one, and the dissenting opinion of Merrell, *J.* in the *City Bank Farmers Trust* case remains the best exposition of the law with respect to the nature of the option in multiple currency bonds. The Court is respectfully referred to pages 643-4 of Mr. Justice Merrell's opinion.

So far as we have been able to discover, no court has expressly disagreed with the firmly founded proposition, applied in the *Anglo-Continentale* case (and now by the New York Court of Appeals) that, upon the election of the holder of a multiple currency obligation to receive payment in guilders, the obligation ceases to be alternative and

[18]Decided January 11, 1939, as yet unreported and reproduced in Appendix A, pages 99-102 below.

becomes an absolute contract for the payment of guilders only. Instead, both the Circuit Court of Appeals and the District Court in the instant case regarded the election of guilders as immaterial. They failed to consider the fact that, after election, the obligations were no longer alternative, and that the only contract remaining was a single contract for the payment of guilders in Holland. Thus they entirely overlooked the distinguishing circumstance which removes the instruments in suit from the purview of the Joint Resolution.

II

THE JOINT RESOLUTION OF JUNE 5, 1933 DOES NOT AFFECT THE CONTRACT OF THE DEBTOR IN THESE BONDS AND COUPONS TO PAY GUILDERS OR THE OPTION TO RECEIVE PAYMENT OF GUILDERS IN HOLLAND.

Although neither court held or indicated that an absolute contract to pay guilders would fall within the Joint Resolution, the District Court concluded that (R. 142) "The option contained in the Bonds became inoperative on June 5, 1933 . . . ".[19] The Circuit Court of Appeals affirmed this

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[19]The reason given by the District Court was (R. 142):

"The said Bonds were on June 5, 1933, payable in money of the United States and the said Joint Resolution on that date directed that all obligations then so payable should be discharged upon payment dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. This declaration of the public policy of the United States may not be avoided or defeated by a subsequent purported election to receive payment in a currency other than money of the United States."

holding by implication, at least, when it said that the meaning of the word "payable" as used in the Resolution was "crucial" (R. 249; 98 F. [2d] at 163), and went on to hold that the guilder option in these bonds was unenforceable.[20]

The attempted distinction between an option for the payment of guilders and an absolute, non-alternative contract to pay guilders in Holland is, we submit, palpably unsound. If a simple guilder contract is valid and enforceable, as the respondents concede and as the court below implied, then *a fortiori*, a mere option or firm offer to pay guilders, as part of a more general contract, should also be beyond the possibility of attack. The Joint Resolution, its history, and its interpretation by this and other courts reveal that there can be no substantial distinction under the Joint Resolution between a guilder contract and a guilder option. Neither falls within the purview of the Joint Resolution. It is only by a forced, unnatural construction of certain words in the Joint Resolution, divorced from their context and from the purpose of the Resolution as a whole, that an option to receive payment in guilders can be claimed to fall within the Joint Resolution. It will be seen that, even if the language of the Resolution could be so mutilated, still the fact would

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[20]The necessary steps in the reasoning of the Circuit Court of Appeals are not fully revealed by its opinion. When, however, it described the word "payable" as used in the Resolution as "crucial", it necessarily meant that if these bonds were "payable" in money of the United States on June 5, 1933, as the District Court held them to be, then the District Court's holding that the option for guilders in these bonds became inoperative on that date should be affirmed. The contention of the respondents that the validity of the guilder option depends upon the meaning of the word "payable" will be subsequently considered in detail.

remain that a claim based upon a contract to pay guilders, such as that involved herein, falls within neither the letter nor the spirit of the Resolution.

We shall show first, that neither an option nor a straight contract for the payment of guilders constitutes the evil which Congress attempted to remedy in the Joint Resolution, and second, that the language of the Resolution cannot be construed so as to prevent the enforcement and exercise of the guilder option in these bonds or the enforcement of the absolute contract for guilders resulting from the election to receive payment in that currency.

A. The foreign currency clauses in these bonds are not within the evil struck at by the Joint Resolution.

That traditional gold clauses in obligations payable in money of the United States were the only evil which Congress sought to remedy in the passage of the Joint Resolution is conclusively demonstrated by a reading of the Resolution itself, by considering it in the light of the circumstances under which it was passed, and by an examination of the cases in which the Resolution has been construed and applied.

1. *The text of the Resolution unambiguously discloses that the sole purpose of Congress was to nullify traditional gold clauses in obligations payable in money of the United States.*

The motive of Congress in passing the Joint Resolution, the purpose of the Resolution, and the limited scope which Congress intended to give it are all set forth without am-

biguity in the Resolution itself. A mere look at the Resolution should completely establish that it is confined to gold clauses in contracts calling for payment in money of the United States, and that it can have no bearing whatsoever upon a contract, whether alternative or absolute, for the payment of foreign currency in a foreign country. The title "Joint Resolution to assure uniform value to the coins and currencies of the *United States*" sufficiently negatives the existence of any purpose to cover contracts or clauses calling for the payment of money other than that of the United States. The preamble further discloses the limited purpose and scope intended. Those conditions and determinations that motivated Congress in the passage of the Resolution and the specific subject intended to be covered by the Resolution are described with particularity in the preamble as follows:

> "Whereas the holding of or dealing in *gold* affect the public interest, and are therefore subject to proper regulation and restriction; and
>
> Whereas the *existing emergency* has disclosed that provisions of obligations which *purport* to give the obligee *a right to require payment in gold or a particular kind of coin or currency of the United States* or in an amount *in money of the United States* measured *thereby*, obstruct the power of the Congress to regulate the value of the money of the *United States*, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of *every dollar*, coined or issued by the *United States*, in the markets and in the payment of debts, . . ."

Thus Congress singled out "the holding of or dealing in *gold*" as the particular subject affecting the public in-

terest that required proper regulation and restriction; it found that the traditional gold clause or "provisions of obligations [payable in money of the United States] which *purport* to give the obligee a *right* to require payment in *gold* or a *particular* kind of coin or currency of the *United States*, or in an amount in money of the United States measured *thereby*" obstruct and interfere with the power of Congress and its established monetary policy. There is no mention of foreign money contracts, whether contained in separate instruments or in the same instrument with a gold clause.

The operative provisions of the Resolution also confine its effect to the nullification of gold clauses and affirmatively preserve the remainder of the contract or obligation. Because of the findings and determinations recited in the preamble, Congress resolved in Section 1 of the Joint Resolution,

> "That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United

States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law."

In order to make assurance doubly sure Congress further resolved:

"(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

Congress could not have stated more emphatically that its sole object was to nullify the traditional gold clause. To avoid any possibility of misunderstanding, it fully described such a clause, first in the preamble and again in paragraph (a) to Section 1. Congress was; moreover, cautious to the point of redundancy in announcing to the public that it was concerned only with such traditional gold clauses when they were contained in or made with respect to obligations payable in *money of the United States*. Manifestly it was in such a situation, and no other, that gold clauses could affect or disturb "the equal power of every *dollar*, coined or issued by the United States, in the markets and in the payment of debts". Even within the limits of contracts for the payment of United States money, Congress was careful to preserve inviolate every other provision or clause in or with respect to obligations except the gold clause. Thus, in the second sentence of paragraph (a) of Section 1 Congress affirmatively provides that obligations with gold clauses

shall not be rendered void in their entirety, but that they "shall be discharged" by the debtor who shall be compelled to pay the full dollar amount of the obligation in legal tender dollars. And in the next sentence, Congress, though repealing all previous laws authorizing the inclusion of gold clauses in obligations of the United States, specifies that "the repeal of any such provision shall not invalidate any other provision or authority contained in such law".

The simple answer to any contention that the foreign currency clauses in these bonds and coupons constitute an *evil which Congress* sought to cure by the passage of the Joint Resolution is that the Resolution contains no statement or implication to that effect. One would naturally suppose that the lack of any mention of multiple currency clauses or of foreign money contracts by Congress would conclusively establish the absence of any purpose on the part of Congress to invalidate them. No condemnation by Congress of multiple currency clauses or of simple contracts for the payment of foreign money can, however, be found within the four corners of the Resolution. Although the Joint Resolution may be ambiguous in other respects, it is not ambiguous in so far as foreign money contracts are concerned, for it completely fails to mention them. And in the absence of ambiguity, we can see no basis for looking outside of the Resolution in order to determine what other matters Congress might be deemed to have intended to cover by language which embraces no other matters.

2. *Any permissible doubt as to the limited purpose of the Resolution is dispelled upon consideration of its legislative history and the circumstances surrounding its passage.*

Despite the fact that no mention of foreign currency clauses may be found in the Resolution, the Circuit Court of Appeals was unable to hold that "the Resolution is, as to the matter here, unambiguous" (R. 249; 98 F. [2d] at 163). The respondents, moreover, attempted below to establish a purpose in the Resolution to nullify foreign currency clauses by referring, not to the Resolution itself, but to the economic and political events that gave rise to the legislation, and by speculating on the basis of those events as to whether or not Congress entertained the purpose of outlawing foreign money alternatives when it nullified the gold clause. We doubt whether it is either permissible or necessary to speculate as to whether Congress intended to hit foreign currency clauses when it passed the Joint Resolution.

Nevertheless an examination of the legislative setting of the Resolution and of the debates in Congress concerning its passage would, if permissible, merely corroborate and fortify the conclusion that Congress had no intent or purpose to interfere with contracts calling for payment in foreign currencies when it determined to legislate against the gold clause.

So far as we have been able to discover, Congress never even considered the advisability of treating foreign money contracts in the same manner that it prescribed for the traditional gold clause in obligations payable in money of the United States. In the extensive debates on the Joint Resolution (77 Cong. Rec., 73d Cong., First Sess., pp. 4528-4563, 4889-4929) one fails to find a single reference to multiple currency clauses. Nor does it appear that such clauses were considered in any of the other legislative and

executive acts that took effect or were in contemplation during the period when the Joint Resolution was being considered by Congress. In the only committee report on the Joint Resolution (H. R. Rep. No. 169, 73d Cong., First Sess.) neither multiple currency clauses nor contracts for the payment of foreign money are mentioned.

That Congress, however, was fully cognizant of the fact that the depreciation of the dollar would raise the comparative value of commodities and of foreign exchange is shown by the occasional reference to that fact in the debates on the Joint Resolution. Thus Senator Fletcher, in charge of the passage of the Resolution in the Senate, when informed that the dollar had already depreciated 20% "as measured by foreign governments" replied (77 Cong. Rec., *supra*, at 4893):

> "There is an embargo on the export of gold and the Senator would not spend that money in foreign countries anyway.'"

Then, in reply to the statement that the farmers of this country who send their products abroad would get less money than they ever got before, Senator Fletcher replied:

> "On the contrary, they will get more and are getting more, and they will get more still. *The effect will be to increase the prices of the commodities*

Subsequently, when the result of the devaluation of the dollar was being debated, the following colloquy took place (77 Cong. Rec., *supra*, at 4897):

> "Mr. Reed. The Senator asks the result. Its immediate result will be just as it has been of recent

days, to drive down the gold value of United States currency. We have seen that in the foreign exchange quotations of the world. The dollar has been weakened and is pronouncedly weaker in its gold-purchasing power since this measure was introduced by the administration in the House of Representatives.

Mr. Barkley. Has there not been a corresponding increase in the value of commodities?

Mr. Reed. Of course.

Mr. Barkley. Is not that one of the objects of the effort to bring about a restoration of commodity prices?

Mr. Reed. Of course."

Reference was made on the same page to the fact that Americans in foreign service had made urgent appeals because their salaries when translated into foreign money were not sufficient to give them the barest livelihood.[21] Senator Wheeler who was a strong supporter of the Resolution replied:

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[21] Congress made express recognition of the increased costs which dollar devaluation would impose upon American nationals having foreign currency obligations. The Act of March 26, 1934, 48 Stat. 466, authorized annual appropriations

> "to meet losses sustained on and after July 15, 1933, by officers, enlisted men, and employes of the United States while in service in foreign countries due to the appreciation of foreign currencies in their relation to the American dollar . . . ."

By Act of May 30, 1934, 48 Stat. 817, 824, \$7,438,000 was appropriated for this purpose for the fiscal year ending June 30, 1935.

> "We went off the gold standard because practically every country in the world had depreciated its currency, and consequently our world trade was being wrecked by reason of those countries going off the gold standard."

The effect of the previous embargo on the exportation of gold from the United States on the value of the dollar in the terms of foreign currency and on the value of commodities in world markets was again alluded to at pages 4898-9. Senator Kean at page 4899 referred to the fact that the devaluation of the dollar would "relieve the foreign governments of a part of their debt" to the United States. And Senator Borah, in arguing that the Joint Resolution was constitutional, repeatedly emphasized that it was confined to contracts requiring the payment of dollars and did not extend to commodity contracts. For example at page 4901 he said:

> "I am not discussing now a commodity contract; I am discussing a contract to pay dollars."

And again at page 4902 he said:

> "I am not to be confused by treating these contracts as contracts to deliver a commodity: they are contracts to pay money, and Congress may control them, because they are contracts to pay money."

It is clear from these and other remarks in the Congressional Record that, in passing the Joint Resolution Congress by no means intended to counteract the depreciation in the value of the dollar as compared to commodities and foreign money, even though it was well aware of the fact that the comparative value of the dollar was rapidly declining at that time. On the contrary, it is evident that

ongress actually desired the dollar to depreciate in terms foreign money and in terms of commodities, and that the llar was deliberately devalued by legislation *in pari mania* with the Joint Resolution. See *Norman* v. *Baltimore Ohio Railroad Co.*, 294 U. S. 240, 295. Inasmuch as the esolution was but a step in the devaluation of the dollar d the demonetization of gold, effected by the series of easures described in the *Norman* case, it is inconceivable at Congress could have intended to destroy the object of s own monetary policy by extending the Joint Resolution foreign money contracts, which are in substance comodity contracts (pp. 29-32 above).

Yet another reason why Congress did not condemn ultiple currency clauses when it passed the Joint Resoluon was that such clauses have never threatened or intered with any monetary policy established by Congress. was the *volume* of outstanding gold clauses in the year 933, and the *scarcity of gold*, that created the emergency hich in the eyes of Congress called for the passage of the oint Resolution. The Resolution itself, together with the her contemporaneous legislative measures, was directed the crisis resulting from the unnatural demand for gold. he debates in the House and in the Senate with respect to e passage of the Joint Resolution abound with the argument that the available gold in the United States was, in 933, insufficient to meet the demands that might arise der outstanding gold clauses. The Committee on Banking d Currency of the House in its report on the Joint Resolun (H. R. Rep. No. 169, 73d. Cong., First Sess.) states at "the resolution is intended to accomplish three purses" and presumably no others. The only purposes umerated were:

"(1) It declares that the clauses in public and private obligations *stating that* they are payable in *gold* or a *specific coin or currency* [of the United States] are contrary to public policy; (2) it provides that obligations, public and private, *expressed to be payable in gold or in a specific coin or currency, may be* discharged dollar for dollar in legal tender. It also provides that no future obligations, public or private, *shall be expressed* as payable in any specific coin or currency; (3) it makes certain technical amendments to the Thomas amendment which are necessary to carry out the intention of that legislation regarding what shall be legal tender in the United States."

The Committee then continued:

"1. The occasion for the declaration in the resolution that the gold clauses are contrary to public policy arises out of the experiences of the *present emergency. These gold clauses* render ineffective the power of the Government to create a currency and determine the value thereof. *If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause.* In the light of this situation *two phenomena which have developed during the present emergency* make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to *hoard gold;* the second is the tendency for *capital to to leave the country.* Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the *requirements of a situation in which many billions of dollars of*

securities are expressed in a particular form of the circulating medium, particularly when it is *the medium upon which the entire credit and currency structure rests.*"

presentative Steagall who steered the Resolution rough the House, supplemented the Committee's Report its support by arguing that "contracts that have been de payable in gold are impossible of fulfillment" (77 ng. Rec. at 4531. See also his remarks at 4528, 4530 and 45). The primary and apparently the only purpose of the int Resolution was thus to combat the unnatural demand r gold in this country. There was in 1933 no threatened ortage or unnatural demand for foreign currency; and ere is no reason to suppose that foreign currency clauses ould have had any noticeable effect upon the national onomy as a whole. Even if Congress had considered reign currency clauses as an evil, of which there is no idence, still it is apparent that Congress would have re-rded them as of "no particular consequence" because ey "applied to a very limited number of contracts and curity issues". Whereas in *Norman* v. *Baltimore & Ohio ilroad Co.,* 294 U. S. 240, 313, it was observed that "the *lume* of obligations with gold clauses . . . *obviously* had bearing upon the question whether their existence con-tuted a *substantial* obstruction to Congressional policy", d that this volume was estimated to be seventy-five lion dollars or more, foreign currency options, on the ier hand, do not amount to one per cent. of this sum.[22]

Professor Nussbaum's article on Multiple Currency d Index Clauses[22] contains a thorough analysis of other

[22]Nussbaum *Multiple Currency and Index Clauses*, 84 U

economic, social and political differences between the multiple currency options and gold clauses, pointing out among other things that there is always the possibility that the foreign currency will depreciate as much or more than the domestic currency, or that the comparative value of the domestic currency may revive by the time the bonds mature. Another material distinction is that multiple currency obligations, unlike gold clauses, "have always been undertaken with a clear understanding of their meaning and with no pressure of an actually inescapable custom" (84 U. of Pa. L. Rev. at pp. 576-7). This factor, as already noted, is present in the situation at bar, where the record shows that, before the issuance of these bonds and coupons, the Debtor made arrangements with the petitioner contemplating payment of "a fair current rate" for the guilders whenever payment in guilders should be elected (R. 172). Furthermore, the Debtor's president in his letter (summarized in the offering circular of the bonds) made specific reference to the multiple currency options in these instruments (R. 133-4, 160). There can be no question that the options were deliberately inserted in the bonds and coupons as a special inducement to purchasers, both citizens and aliens. The House Committee on Banking and Currency in its report, on the other hand, emphasized the fact that ". . . in this country virtually all obligations, almost as a matter of routine, contain the gold clause."

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brief in opposition to certiorari in this case, the argument is made that only approximately ninety million dollars face amount of bonds issued by American obligors and now outstanding, have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard, and that, accordingly, the question of the enforceability of multiple currency clauses is of no great public importance (pp. 17-18).

The foreign money clauses in these bonds and coupons, unlike the traditional gold clause, cannot be said to have been inserted in the instruments "as a matter of routine".

Perhaps the most material distinction in so far as the Joint Resolution is concerned between the gold clauses there prohibited, and the multiple currency clauses there unmentioned, is found in the relative bearing of settled constitutional principles. That the Constitution of the United States would not permit a construction of the Joint Resolution so as to include the guilder option in these bonds and coupons is a point which will be subsequently enlarged. Without extended discussion, however, it will be apparent that the reasons assigned by this Court in the *Norman* case for sustaining the Resolution as applied to the gold clause in private contracts requiring payment of money of the United States, are inapplicable to multiple currency clauses. Whereas Congress unquestionably believed that the elimination of gold clauses from such contracts came within its power to remove substantial obstacles to the monetary policy it had established, there is no indication that Congress found in multiple currency clauses any obstruction, however slight, to the fulfillment of that policy. Whereas gold is concededly the very basis upon which the currency of this country is based, and is therefore subject to the control of Congress, a contract to pay foreign money in a foreign jurisdiction is, *prima facie*, beyond the territorial and constitutional powers of Congress. Congress may well have questioned whether its power over contracts for the payment of foreign money was any greater than its power over other commodity contracts, which as the Congressional debates show, Congress understood to lie well beyond its regulatory power.

Accordingly the Resolution itself and the circumstances surrounding its passage affirmatively establish that the sole purpose of Congress in passing the law was to nullify the gold clauses so generally present in obligations payable in money of the United States, and that for numerous sufficient reasons it had no desire or purpose to interfere with foreign money clauses, such as those contained in these bonds and coupons.

3. *The claim for guilders is not within the purpose of the Joint Resolution merely because it is greater in amount than a claim for dollars would have been.*

The courts below refused to confine the Joint Resolution to its sole intended purpose of nullifying gold clauses, because of an apparently strong belief on their part that the Resolution, even though it does not so provide, should be construed to prevent anyone from acquiring an "advantage" or "premium" as a result of the devaluation of the dollar. This is shown by the statement of the Circuit Court of Appeals (R. 253; 98 F. [2d] at 165-6):

> "Thus by running around an international stump—passing through Holland en route—the holder of every bond and coupon *enriches* himself substantially at the *expense* of the debtor and of other creditors . . .
>
> Such a result would be squarely within a situation *similar* to that expressed by the Chief Justice in outlining the effect of devaluation of the dollar (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 315). Clearly, such a result so reached would interfere with the purpose of the Joint Resolution . . . In short, the evil sought to be avoided by the Resolution is accomplished by a form of indirection, and to

> that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated. We think such a result brings these instruments within the intendment of the Resolution and within the ambiguous expressions, set out hereinabove, of the Resolution."

In other words, the court assumed that the result of the enforcement of the guilder claim in these bonds and coupons was one prohibited by the Joint Resolution. As we have previously demonstrated (pp. 16, 22-32 above) this assumption of the court was based largely, if not entirely, upon a misapprehension as to the nature of the claim for guilders which the petitioner seeks to enforce and as to the nature of the option for guilders upon which the claim is predicated. The guilder option in these bonds is not the equivalent in law or in fact of a promise to pay in gold coin of the United States of the weight and fineness of January 1, 1912, as the court below erroneously conceived it. That the result of the guilder claim happens in this case to be practically the same in amount as a claim for gold dollars of the 1912 standard would have been, cannot of itself bring the guilder claim within the evil of gold clauses.

The Joint Resolution is not directed against any particular result, but is aimed solely at a particular type of clause when it appears in obligations payable in money of the United States. It does not provide that gold clauses or any other clauses similar in result or in effect, are against public policy, but limits itself to gold clauses, and strikes them down regardless of what their result may be. The Circuit Court of Appeals itself held this to be the fact when it concluded after an examination of the Resolution (R. 251; 98 F. [2d] at 164):

"In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby'—as defined in paragraph (b), 'payable in money of the United States.'"

Even according to the court below, therefore, the single evil struck at by the Joint Resolution was the traditional gold clause in contracts payable in money of the United States, whatever the effect of such a clause might prove to be in a particular case.

Nor can it be said, as the court below held, that the foreign currency alternatives in these bonds and coupons "accomplished by a form of indirection" the evil sought to be avoided by the Resolution (R. 253; 98 F. [2d] at 166). These clauses were inserted in the bonds without any view to defeating the purpose of the Joint Resolution. This the court below undoubtedly recognized when it said (R. 252; 98 F. [2d] at 165):

"The provision [for payment in foreign money] may or may not have had an *entirely proper* business purpose . . . But it is the effect and not the purpose which is important."

The effect, however, did not materialize until more than twenty years after the bonds were executed, and there is no evidence that it was or might have been foreseen by the parties. There could have been no attempt to evade the Joint Resolution when the guilder alternatives were placed in these instruments some twenty years before the Resolution became law, and accordingly no doctrine related to

evasion can be applied retroactively to destroy the contract right granted to the holders of these bonds and coupons when they were issued in 1912. If Congress had desired retroactively to destroy the foreign currency alternatives in these bonds, it would have employed language directly and unmistakably adapted to that purpose. Contract rights, such as the right to be paid in guilders, cannot be destroyed by mere implication founded upon the assumption that their effect is similar to that of the gold clause upon which Congress found it necessary to place an explicit ban. *Shwab v. Doyle*, 258 U. S. 529, 534; 2 Sutherland, Statutes and Statutory Construction (2nd Ed., 1904) Section 580.

The courts below attempted to place upon this Court the responsibility for their conclusions that the mere result of the guilder claim was enough to bring it within the condemnation of the Joint Resolution. Thus the Circuit Court of Appeals said with respect to the result that would follow the enforcement of the guilder option in these bonds and coupons (R. 253; 98 F. [2d] at 165-6):

> "Such a result would be squarely within a situation similar to that expressed by the Chief Justice in outlining the effect of devaluation of the dollar (*Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 315)."

The court had previously said (R. 250; 98 F. [2d] at 163):

> "We find ourselves in somewhat the situation presented in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324 . . . where the Court was driven to determine the construction and application of this Resolution by resort to considerations of 'the evil to be remedied' . . . and whether the particular contract provision involved there was within the evil."

Indeed, every opinion holding that multiple currency options fall within the Joint Resolution, purported to follow the construction given to that statute by this Court.[23]

Neither the *Norman* case nor the *Holyoke* case, as we read them, extended the Joint Resolution beyond the nullification of gold clauses or even suggested that it could be so extended. Inasmuch as both cases involved gold clauses within the express letter and declared purpose of the Joint Resolution, anything said in the opinions was necessarily directed to gold clauses and to nothing else.

It is true that in the *Norman* case this Court, in holding that the Resolution was constitutional even as applied to "gold value" clauses, referred (294 U. S. at 315) to the undesirable economic consequences that would result throughout the nation if the tremendous number of gold clauses should be enforced according to their terms. In this connection it was pointed out that, although the States, municipalities, public utilities and private corporations would receive their income according to a new standard, their "gold bonds" outstanding would compel them to pay their creditors in accordance with the old, more burdensome standard. In this observation addressed to the reasonable-

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[23]See *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. (N. Y.) 634 (1935) at 635-6; *Zurich General Accident & Liability Ins. Co., Ltd.*, v. *Lackawanna Steel Co.*, 164 Misc. (N. Y.) 498 (1937) at 502, affirmed without opinion 254 App. Div. 839 (1937), reversed — N. Y. — on January 11, 1939 (see Appendix A, pp. 99-102 below). The District Court, it will be remembered, held that the decision of this Court in the *Holyoke* case in effect overruled the decision of the Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A.G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11, where a guilder claim on these very bonds and coupons was enforced.

ness and constitutionality of the Congressional action in expressly nullifying gold clauses, one is unable to find the slightest implication that any other clause, requiring debtors to pay their obligations according to a pre-1933 standard, would be invalid.[24] If Congress had regarded the multiple currency clauses as falling within the same category as gold clauses, it could easily have expressed itself to that effect. And in the *Norman* case this Court did not attempt to decide whether contracts having the same effect as gold clauses are or should have been prohibited by the Joint Resolution, but left this question for Congress to determine.[25]

Nor is there any indication in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, that

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[24] It is elementary that the language of the Court must be limited by the circumstances in which it was used. *Taylor* v. *Voss*, 271 U. S. 176, 184 (1926). The New York Court has well said: "The language of any opinion must be confined to the facts before the court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 88 (1934).

[25] Thus, for example, the Legal Tender Cases were distinguished by the Court in the *Norman* case on the ground that in those cases there had been no express prohibition of gold or specie contracts by Congress, such as the express prohibition of such contracts in the Joint Resolution (294 U. S. at 307). Nevertheless, the Court fully recognized that the gold and specie contracts upheld in the Legal Tender Cases imposed upon the debtor an increased burden and gave the creditor an advantage over other creditors who held contracts payable in legal tender. *Cf. Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258; *Dewing* v. *Sears*, 11 Wall. 379; *Trebilcock* v. *Wilson*, 12 Wall. 687; *Thompson* v. *Butler*, 95 U. S. 694; *Gregory* v. *Morris*, 96 U. S. 619. See also *The Vaughn & Telegraph*, 14 Wall. 258; *The Emily Souder*, 17 Wall. 666.

the Joint Resolution extends to any contract that might prove burdensome to the debtor or that might have the same effect as a gold clause contract. Although that case involved a contract containing two alternatives, both branches were prohibited by the Resolution and, accordingly, the entire transaction was held to constitute the very evil against which the Resolution was directed. The Resolution, as construed and applied in that case, could not possibly include within its scope the present claim for guilders. As the Court said (pp. 338-9):

> "The Resolution touches gold as well as coin or currency [of the United States] whenever transactions in either are within the evil to be remedied. We learn from the preamble that 'provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. *Accordingly*, all *such* provisions are declared to be against public policy, and every obligation, heretofore or hereafter incurred, *though* it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment. Transactions for the sale or delivery of gold for industrial purposes are not within the evil to be remedied, and so are not within the statute. . . . An obligation to make delivery upon a *bona fide* sale is *not fairly* [illegible]

be classified as an obligation 'payable in money' (Joint Resolution, subdivision (b)), or so we now assume. But very definitely, the evil does include transactions whereby gold, coined or uncoined, is to be delivered *in satisfaction of a debt expressed in terms of dollars,* payment, not sale, being then the end to be achieved. As definitely, indeed more obviously, the evil includes transactions *whereby a debt is to be discharged,* not in bullion, *but in dollars,* if the number of the dollars is to be increased or diminished in proportion to the diminution or the increase of the gold basis of the currency. Both forms of obligation are illustrations of the very mischief that Congress sought to hit."

For these reasons, it was held that a lease calling for ayment as rent of "a quantity of gold which shall be equal n amount to Fifteen Hundred ($1500.00) Dollars of the old coin of the United States of the standard of weight nd fineness of the year 1894, or the equivalent of this comodity in United States currency", not only fell within the etter of the Resolution, but also constituted the very mishief that Congress sought to hit. In substance the only uestion before the Court was whether the lease before it as a commodity contract, and therefore not within the vil of the Resolution, although prohibited by its letter, or hether it was a money contract. After observing that the bligor had the option of paying the equivalent in dollars stead of gold, that the only measure of the liability was e dollar value of the gold, *at the time of payment,* this ourt held that the alternative forms of payment "shed ght upon each other" and that the contract was clearly one r the payment of money.

The distinctions between the multiple currency options in the present bonds and the alternatives considered in the *Holyoke* case are decisive. Whereas in the *Holyoke* case each of the alternatives was prohibited by the language of the Resolution, here four out of five alternatives in the bonds are not prohibited; whereas there the obligor had the right to elect which alternative he would perform, here he has expressly surrendered that right; whereas there the obligation of payment was measured by gold coin of the United States *at the time of payment*, here the amounts promised are not so measured *at the time of payment*. As we have seen (pp. 24-32 above), the foreign currency amounts promised in these bonds were the equivalent of a thousand dollars in gold coin of the United States on January 1, 1912, as of which date the bonds were issued, but that equivalence ceased upon that date, and the amounts promised fluctuated thereafter, as foreseen, in accordance with the variations in foreign exchange and the alterations of the monetary policies of the foreign countries in which the payment was to be made.

Clearly then, there is no conflict between the construction given the Joint Resolution in the *Holyoke* case and that given to it in the cases where the Joint Resolution was held inapplicable to multiple currency clauses. *Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. den., 298 U. S. 655; *McAdoo v. Southern Pacific Co.*, 10 F. Supp. 953, rev. on other grounds, 80 F. (2d) 121; and *Zurich General Accident & Liability Insurance Company, Ltd. v. Bethlehem Steel Company*, — N. Y. —, January 11, 1939 (Appendix A, pp. 99-102 below). A concise statement as to

hy multiple currency options do not fall within either the tter or the spirit of the Joint Resolution was given by udge Hand in the *Anglo-Continentale* case, 81 F. (2d) 11, t page 12:

> "They are within the resolution only in case its terms cover them, which they do not. It only proscribes a 'provision' which 'purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured' by either. Since, as we have seen, the promise to pay guilders did not 'purport . . . to require payment in gold,' the resolution does not hit it."

nd in conclusion he said (p. 13):

> "There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose: and we are not here certain of the existence of such a purpose."

The same view was taken in the *McAdoo* case in an pinion expressly approved in the *Anglo-Continentale* case 81 F. [2d] at 13). In that case, District Judge Lindley, fter pointing out that the Resolution was confined to the old clauses therein described, when contained in obligaons payable in money of the United States, continued p. 954):

> "The bar of illegality, by its own terms, is defined and limited in effect. Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries. The preamble of the resolution so indicates. If we give full force and effect to the unambiguous language employed, we are unable to point out any words that disclose any

> intent to extend the prohibition further than that language clearly indicates. Consequently, the rights and liabilities of the parties in the contracts under consideration, not being within the legislation, are the same as if the resolution had never been adopted."

He then cited decisions of this Court establishing that, but for the Joint Resolution, the foreign money contract would be legal and enforceable, and went on to say:

> "Until the Congress shall attempt to extend the power heretofore exercised to contracts calling for payment in foreign money, it is futile for the court to enter upon any exposition of the propriety of such action."

Perhaps the most thorough and closely reasoned discussion of the entire subject of the relation between multiple currency clauses and the Joint Resolution is found in the dissenting opinion of Merrell, J., in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.,* 244 App. Div. (N. Y.) 634 (1935). The opinion of the majority of the judges of that court, holding that coupons of the Bethlehem Steel Company containing multiple currency options were required by the unexpressed "legislative intent" and considerations of "good citizenship" to be discharged dollar for dollar by the Joint Resolution, was rejected in the *Anglo-Continentale* case (81 F. [2d] at 13), and the conclusion reached in the latter case has now been adopted by the New York Court of Appeals in the *Zurich* case.[26]

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[26]Reprinted in full in Appendix A, pp. 99-102 below.

B. Selected language of the Joint Resolution cannot be construed, in disregard of the clear purpose of the Resolution as a whole, so as to destroy the guilder option in these bonds.

Inasmuch as there was clearly no purpose on the part of Congress to nullify foreign money contracts, whether found in separate instruments or in conjunction with gold clauses, it is impossible to follow the holding of the Circuit Court of Appeals that the present claim for guilders is barred by the Joint Resolution.

Difficult as it is to understand the inconsistencies in the opinion of the court, the most likely explanation is that, following the District Court, it held these bonds and coupons to be "obligations payable in money of the United States" within the meaning of the second sentence in the Joint Resolution which provides that such obligations "shall be discharged" dollar for dollar in legal tender. In other words, it interpreted the Resolution as covering any instrument containing a dollar promise and as requiring that every other promise in the instrument shall be discharged upon the payment of the dollar promise in legal tender dollars. This was the construction urged upon the courts below by the respondents and adopted by the District Court in its conclusion of law No. 6 (R. 142).

Many fallacies underlie this construction of the language of the Resolution. In the first place, it gives to the phrase "obligations payable in money of the United States" an inaccurate, unnatural and unworkable meaning. In the second place, it interprets the phrase "shall be discharged" as requiring the discharge of the dollar promise in the in-

strument on or as of June 5, 1933, even though no promise in the instrument had matured on or before that date. In the third place, this construction necessitates a complete disregard of the declared purpose and clear intent of the Resolution, construed as a whole.

1. *The bonds and coupons were never "obligations payable in money of the United States" within the meaning of the Resolution.*

In holding that these bonds and coupons are "obligations payable in money of the United States" both courts below assumed that the word "obligation" means the instrument and not the debt it evidences and that the word "payable" means a contingent and not a fixed duty to pay. It is only by such a definition of the words "obligations" and "payable" that they can possibly cover these bonds and coupons, for there was never any obligatory duty on the part of the Debtor to pay these bonds and coupons in dollars. The duty of the Debtor to pay dollars was merely contingent, depending upon an election of the bondholder to receive dollars; and in the absence of any such election on the part of the bondholder, the Debtor's dollar liability never materialized. Accordingly, unless "obligation" means the instrument and not the duty, and unless the word "payable" means a contingent or hypothetical, but not absolute duty to pay, then these bonds were never "obligations payable in money of the United States".

The primary meaning of "obligation" is "duty". *Bouvier's Law Dictionary.* The word "obligation" may in certain instances be used as a description of the instrument as well as the debt or duty which it represents. It does not

follow that it can be used only in such a limited and secondary sense in the Resolution merely because, as the respondents have contended, this Court, in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 313, referred to "the volume of obligations with gold clauses" and the "outstanding obligations with gold clauses". The opinion in that case reveals that the Court was not attempting to construe the word "obligation" but was merely employing it as a synonym for the word "bonds". Although these bonds and coupons are undoubtedly "obligations" in this one sense of the word, they are not "obligations payable in money of the United States" under any reasonable interpretation of the Joint Resolution.

Just as the word "obligation" may have more than one meaning, so also the word "payable" is not always to be confined to a single meaning. Under some circumstances it may perhaps mean no more than capable of being paid upon the happening of some future event or contingency. This was the meaning given to the word by both courts below. On the other hand, where the word is used in commercial transactions, such as that involved here, it means the absolute, non-contingent duty of payment. In *Ingram* v. *Mandler*, 56 F. (2d) 994, 997 (C. C. A. 10, 1932) it was said:

> "The word payable, when used in connection with commercial transactions, means that which *is to be paid rather than that which may be paid.*"

The language of the Missouri court in *Swanson* v. *Spencer*, 177 Mo. App. 124, 129, 163 S. W. 285, 286 (1914), is of special interest in interpreting the contract of a Missouri corporation:

> "The word 'payable', when used in business transactions, means that which is to be paid, rather than that which may be paid. 6 Words and Phrases, 5246. A debt is payable *whenever the debtor has the right to pay it,* regardless of whether the time has arrived when the creditor may have his action upon it."

The debt represented by the bonds in this cause did not, within the definition of the Missouri court, become payable in any currency until maturity and until petitioner had elected the currency of payment, because prior to that time, under the express provisions of the mortgage and bond, the Debtor had no right to pay. The bonds were not "payable" in United States money in the absence of an election to receive it.[27]

Thus the natural and most reasonable meaning of the phrase "obligations payable in money of the United States" as used in the Resolution is "debts to be paid in money of the United States". This was the construction given the phrase in the *Holyoke* case (302 U. S. at 339-340) and in the Congressional debates and the House Report on the Resolution. The House Committee on Banking and Currency, in its Report No. 169, 73d Cong., First Sess., entertained no doubt about the scope of the Resolution. The Committee regarded it as being confined to

> ". . . obligations *stating that* they are payable in gold or a specific coin or currency [of the United States] . . ."

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[27]**Note in 49 Harv. L. Rev. 153 (1935). See also 87 U. of Pa. L. Rev. 232 (1938).**

ob..ations

"... *expressed to be* payable in gold" etc.,

d as providing that

> "... no future obligations ... *shall be expressed as* payable in any specific coin or currency [of the United States] ..."

he analysis of the Resolution by Representative Steagall, hairman of the Committee sponsoring the Resolution in e House was even plainer. He said (77 Cong. Rec. at 528):

> "This resolution declares that contracts *requiring the discharge of obligations solely* by payments in gold are contrary to public policy; that hereafter no *such* contracts may be made and that all *such* contracts now in existence or that may hereafter exist shall be payable in lawful money of the United States."

o also Senator Borah, as quoted above at page 56, repeatedly emphasized the fact that the Resolution applied to ... a contract *to pay* dollars ..." See 77 Cong. Rec. 4901-4902. As to such debts, the second sentence in the esolution provides that they shall be discharged upon the ayment of one legal tender dollar for every dollar which e Debtor is required to pay under his debt.

If "obligation" is given its natural meaning of the *duty r liability* evidenced in the instrument, then there was no uty of the Debtor that could possibly be discharged "dollar or dollar", because a duty in terms of dollars was never ncurred. The second sentence of the Resolution does not peak of "obligations" generally but solely of "every obliga-

tion, heretofore or hereafter *incurred* . . . ". One does not ordinarily incur an instrument; but one does incur a liability or a duty. Thus, although the word "obligation", standing alone, might conceivably mean either the instrument or the liability it represents, the word when used in conjunction with and modified by the word "incurred" can mean only the liability or duty. This was pointed out in the case of *Exchange Bank* v. *Ford*, 7 Colo. 314, 317, 3 Pac. 449, 451 (1884), where the court said in interpreting the sentence "where the defendant has been guilty of fraud in contracting the debt *or incurring the obligation* for which the action is brought", etc.:

> "It seems reasonably certain that the Legislature mean, when they speak of the obligation being 'incurred', *a liability affixed* by law to the fraudulent conduct mentioned. *Contracts* are either expressly made by the parties or created by implication of law: it can hardly be said that they are ever *incurred*. The *liability* is incurred when the contract is violated or the fraud committed; and when the word 'obligation' is used with reference to this liability, the obligation may also be said to be *incurred*."

Moreover the Resolution provides that the "obligation" shall be "discharged," which naturally implies that the duty or liability is to be discharged, and not merely the paper or instrument upon which that obligation is manifested. Again, the definition of the term "obligation" given in paragraph (b) of the Resolution includes "every obligation of and *to* the United States". Although an instrument may be considered as an obligation of the United States, it is unusual and unnatural to speak of an instrument as an obligation "to" anyone.

Accordingly in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company,* 81 F. (2d) 11, *supra,* the court said (p. 12):

> ". . . it is a plausible, though to us not a persuasive argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States."

We even question the plausibility of the argument. In its most recent decision on the Joint Resolution, this Court in *Smyth* v. *United States,* 302 U. S. 329, 359, 361, referred repeatedly to "the obligation of the bonds", and thus distinguished between the instrument containing a duty to pay and the duty itself, as expressed by the word "obligation". More specifically, in *Holyoke Water Power Co.* v. *American Writing Paper Co.,* 300 U. S. 324, 339-40, this Court consistently referred to the word "obligation" in the Resolution as meaning "a debt" either "expressed in terms of dollars" or "to be discharged . . . in dollars".

The New York Court of Appeals but recently held in *Zurich General Accident & Liability Insurance Company, Ltd.* v. *Bethlehem Steel Company* (Appendix A hereto, at p. 100) that a claim for Swiss francs based upon an election of that currency by the holder of the multiple currency bonds of the Bethlehem Steel Company was not barred by the Joint Resolution, saying:

> "On the facts of this case, the obligation was not payable in 'money of the United States' but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but

the fact is that it did become payable in Switzerland in Swiss currency."

Furthermore, if the words in the Resolution "obligation payable in money of the United States" are broad enough to include these bonds and coupons, even though no fixed duty to pay in money of the United States was ever incurred, then the phrase is devoid of legal significance. The provision for discharge "dollar for dollar" could only apply to an instrument or debt which is capable of discharge "dollar for dollar". For example, the debt in these bonds to pay guilders, and not dollars, could not be discharged under any hypothesis "upon payment dollar for dollar". The word "payable" must either be given its accepted meaning in commercial transactions importing a present absolute duty to pay, or else it can be ignored entirely as adding nothing that is not covered necessarily by the "dollar for dollar" provision.

2. *These bonds and coupons are not now payable in money of the United States.*

Even if we could assume that these bonds and coupons, contrary to the plain import of the words, constituted "obligations payable in money of the United States" at the time when they were issued and on June 5, 1933, when the Joint Resolution became law, the fact would nevertheless remain that these instruments are not now "payable" in dollars in any sense of the word. The election of guilders on September 24, 1936, converted these bonds and coupons, as we have seen, into straight guilder obligations (pp. 39-46 above). Thus, when the claim on a guilder basis was filed by the petitioner, these bonds and coupons were capable of

payment in guilders only. After the election of guilders, the Debtor was not even under a contingent obligation to perform the dollar alternative in these bonds and coupons.

We are driven to assume that both courts below construe the Resolution as requiring these bonds and coupons to be discharged on June 5, 1933, prior to their maturity and without the election of any medium of payment. The District Court held that the bonds "were on June 5, 1933, payable in money of the United States" and that "the said Joint Resolution on *that date* directed that all obligations *then* so payable should be discharged upon payment, dollar for dollar . . ." (R. 142). The Circuit Court of Appeals also had in mind the status of the bonds prior to the election of guilders and before their maturity, when it said that the "line of cleavage arises" because of the fact that the bonds when issued and prior to election were alternatively payable in gold dollars or in guilders (R. 248; 98 F. [2d] at 162). This is an impossible application of the words "shall be discharged" in the Resolution. These words must of necessity refer to the time when payment is to be made, not to June 5, 1933, when the Resolution was passed. Such is the only proper construction of the complete phrase ". . . shall be discharged *upon payment*, dollar for dollar, in any coin or currency which *at the time of payment* is legal tender for public or private *debts*".

If the phrase "shall be discharged" referred (as the courts below assumed) to the date of the passage of the Joint Resolution and not to the time of payment, the Resolution might well expose all debtors having multiple currency bonds outstanding to an immediate statutory action for the recovery of "dollar for dollar" alternatively promised at some future date, or to an immediate action for

money had and received. It cannot be that Congress intended to accelerate the maturity of all contracts with multiple currency clauses on June 5, 1933.

It is thus apparent that the second sentence of the Joint Resolution, substituting legal tender payment for the dollar amount called for in the gold clause, does not apply until the bonds have matured, until all conditions precedent have been satisfied, and until the time for payment and discharge has arrived. It is equally apparent that the word "obligation", whether referring to the instrument or the absolute debt evidenced thereby, cannot in the nature of things be discharged "dollar for dollar" unless the obligor is, at the time of payment, under a duty to pay dollars.

In conclusion, we repeat that the instruments upon which the present claim is based were never "obligations payable in money of the United States" because the option to receive payment in dollars was never exercised. After September 24, 1936, when guilders were elected, the bonds and coupons became straight contracts for the payment of guilders, just as though there had never been any alternative right to receive payment in another currency. Thus, at the time to which the second sentence of the Joint Resolution must refer, the bonds and coupons were payable in guilders only and their discharge "dollar for dollar" lay beyond the realm of possibility.

3. *If the Resolution is construed as a whole and in the light of its policy, it cannot possibly cover the guilder alternative in these bonds and coupons.*

If one were to accept the holding below that the Joint Resolution is mandatory and requires the discharge of every

instrument which on June 5, 1933, contained an alternative dollar promise, upon the performance of that alternative in legal tender dollars, then one would be compelled to disregard the plain purpose of the Resolution and most of its language. For, if the Resolution is so applied, it would be immaterial whether or not the instrument thereby affected contained a gold clause. According to such a construction, any instrument, whether or not it contained a gold clause, would have to be fully discharged upon the performance of the dollar alternative. The decisions of the courts below would presumably have been no different if each bond had originally contained an alternative promise for the payment of a thousand dollars in paper money instead of a thousand dollars in gold coin of the 1912 standard. So construed and applied, the Resolution has nothing whatever to do with gold clauses, but is no more nor less than a mandatory discharge, by Congressional fiat, of all contracts containing dollar promises.

If, therefore, the words "obligations payable in money of the United States" are allowed to mean what the Circuit Court of Appeals held them to mean, then the preamble to the Resolution and the first sentence of Section 1, declaring gold clauses invalid and against public policy, must be treated as mere surplusage. Furthermore, the obvious purpose of Congress to nullify gold clauses may be wholly disregarded. That the construction given to the Resolution by the courts below is untenable, should require no further demonstration. It is elementary that a statute must be construed as a whole, that its language must be read in the light of its policy and of the evils which call forth the enactment. It is significant that on the day the present case was decided by the Circuit Court of Appeals, two other

judges of the same court held that the Joint Resolution does not affect a lease requiring the payment as yearly rent of 557,280 "grains of pure, unalloyed gold" or, at the option of the lessor, $24,000 in lawful currency of the country. *Emery Bird Thayer Dry Goods Co.* v. *Williams,* 98 F. (2d) 166, 172.[28] In that case it was said with reference to the Joint Resolution:

> "Congress may, of course, express itself tautologically . . . but that it has done so is a conclusion or interpretation to be avoided if fairly possible. A construction resulting in absurdity or unreasonableness should not be adopted if another construction is equally tenable."

The court below completely ignored this timely statement of the elementary principles that should be applied in the construction of the Joint Resolution. Not only did it refuse to adopt an "equally tenable" construction of that statute, but in so doing it also closed its eyes to the fact that the equally tenable construction had been authoritatively proclaimed to be the proper construction by this Court in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 338-339, and by the Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A.G.* v. *St. Louis Southwestern Railway Co.*, 81 F. (2d) 11, cert. den. 298 U. S. 655.

The absurdity of the holding below that these bonds and coupons are "obligations payable in money of the United States" and are therefore compelled by law to be discharged "dollar for dollar" in legal tender is patent on its face. If

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[28]On August 29, 1938, this case was set down for reargument, which was had December 12, 1938.

German creditor, for example, should demand payment in marks, which are far below the value of the dollar, the Circuit Court's construction would compel the Debtor to pay dollars!

It is true that the Circuit Court did not envisage a universal application of its construction of the Joint Resolution. The statement of the court at the end of its opinion that (R. 254; 98 F. [2d] at 166)

> "In what has been stated above, we have had in mind the situation before us",

was perhaps motivated by a realization of the *reductio ad absurdum* that would necessarily follow the application of its construction of the Joint Resolution in other cases involving foreign money contracts. That is to say, the court took the position that the language of the Joint Resolution should be given one meaning under the present state of facts, but might have a contrary meaning under a different set of facts.

Of course, it might conceivably happen that under one state of circumstances a provision in a contract would amount to a gold clause, whereas in another it would not. For example, if it were shown that a clause had been inserted in an instrument for the express purpose of evading the ban on gold clauses found in the Joint Resolution, then there might be sufficient basis for bringing that clause within the Resolution, even though a similar clause would not, because of the absence of such circumstances, constitute an attempt to evade the policy of Congress. In each such situation, however, the language of the Resolution would be given the same meaning. And the clause that

constituted an evasion would fall within the first sentence of the Joint Resolution, invalidating gold clauses. That, as we have repeatedly stated, is not the situation here. The Circuit Court of Appeals, as we understand it, did not hold that the multiple currency clauses in these bonds came within the express condemnation of gold clauses found in the first sentence of the Resolution, but quite to the contrary, held that the second sentence of the Resolution, containing the ambiguous words "obligation payable in money of the United States", compelled the performance of the dollar alternative in these bonds and thereby defeated all other alternatives.

The possibility of giving the language of the Joint Resolution one meaning under one set of circumstances and another meaning under another was considered and rejected by the Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A. G.* v. *St.-Louis Southwestern Railway Co.*, 81 F. (2d) 11. There the court denounced in unmistakable terms any construction of the Joint Resolution that would "give the same words one meaning for one set of obligees and another for another" in holding that no distinction could be drawn between the multiple currency clauses in these bonds and coupons when held by aliens and those same clauses in the hands of citizens of the United States. There it was said (p. 13):

> "If the resolution did not reach bonds held by aliens when passed, it did not reach those then held by citizens; we cannot give the same words one meaning for one set of obligees and another for another. Congress either forbade the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though

its language covers them equally with citizens. There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose; and we are not here certain of the existence of such a purpose."

In *Compania de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland*, 269 N. Y. 22 (1935), cert. den. 295 U. S. 705, it was held that the Joint Resolution governed an action on a foreign bond requiring payment in gold coin of the United States, even though the creditor and the debtor were non-residents of the United States. The court observed that if the Joint Resolution were to apply to citizens of the United States but not to aliens there would (p. 27) "be inaugurated in the United States a dual monetary system, when the express purpose of the joint resolution was to have a single monetary system, where every dollar would be a parity in the payment of debts."

It is doubtful whether the Circuit Court of Appeals would have set aside an election of marks under these bonds and compelled the creditor to receive dollars, because the court regarded it as a substantial objection to the guilder claim of the petitioner that it would give certain bondholders an "advantage", that the share of the petitioner in the estate of the debtor would be more under a guilder claim than under a dollar claim. We find in the Joint Resolution nothing to the effect that a creditor may not enforce a contract which is to his benefit, or that the very same contract may be enforced when it is not to the creditor's advantage to do so. We find nothing that permits or authorizes discrimination between creditors claiming under the same contract. Either the Joint Resolution prohibits the enforcement of all multiple currency options, whatever

the effect of such enforcement might be, or else it does not hit multiple currency options. It is inconceivable that the same language of the Joint Resolution could be susceptible of two divergent constructions, dependent solely upon what the result or who the obligee might be.

III

ANY CONSTRUCTION OF THE JOINT RESOLUTION SO AS TO REACH THE GUILDER OPTION IN THESE BONDS AND COUPONS WOULD RENDER THE RESOLUTION UNCONSTITUTIONAL.

If the language of the Joint Resolution could be stretched to include within its prohibition the guilder claim of the petitioner, based upon these bonds and coupons, it is quite probable that the Resolution itself, and not the guilder claim would become void and unenforceable. The Resolution as construed and applied by the courts below (a) would not be the regulation of money of the United States previously upheld by this Court but (b) would only be an arbitrary, capricious and unreasonable attempt by Congress retroactively to destroy property and contract r[illegible]ts of substance. For this reason alone, if for no other, the construction and application given the Resolution by the Circuit Court of Appeals is untenable, and its holding that the petitioner's claim for guilders is barred should be reversed. This Court reaffirmed in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30 that:

> "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a

statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."

Cf. Russian Volunteer Fleet v. *United States,* 282 U. S. 481, 492, and cases cited.

The courts below, as will be seen, violated this "cardinal principle of statutory construction" and ignored their "plain duty" in converting what was formerly a valid regulation by Congress into an act the validity of which is extremely doubtful to say the least.

A. The Resolution is constitutional only in so far as it nullifies the traditional gold clauses in private contracts payable in money of the United States.

This Court has held that the Joint Resolution is constitutional only to the extent that it nullifies traditional gold clauses in private contracts payable in money of the United States. *Norman* v. *Baltimore & Ohio Railroad Co.,* 294 U. S. 240. Even within this limited field its constitutionality rests upon precarious ground. Four Justices dissented in the *Norman* case, and on the same day eight of the Justices held that the Joint Resolution was unconstitutional in so far as it attempted to repudiate the gold clause in obligations of the United States. *Perry* v. *U. S.,* 294 U. S. 330. The *Norman* case may be taken, therefore, as marking the extreme limits of the implied power of Congress over contracts between private individuals in the exercise of its delegated power "To coin Money, regulate the Value thereof, and of foreign Coin". Art. I, Sec. 8, Cl. 5 of the Constitution.

In the *Norman* case the validity of the Resolution as a monetary measure was (p. 297) "considered in its legislative setting and in the light of other measures *in pari materia*". Thus considered, it was held that the Resolution was merely one of the necessary steps by which Congress had attempted to withdraw gold, gold coin and gold certificates from circulation, to reduce the gold content of the dollar, (upon the assumption that such reduction fell within the power to "regulate" the value of money) and to compensate holders of gold, gold bullion or gold certificates in "an equivalent amount" of lawful money of the United States. These measures and the relation of the Resolution to them are described so fully in the opinion of the Chief Justice that repetition here is unnecessary.[29]

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[29] It will be remembered that all these measures, summarized at pages 295-7 of the Chief Justice's opinion in the *Norman* case, were monetary measures relating principally to the subject of gold and gold coin. Thus the declaration of the Bank Holiday by the President on March 6, 1933, was accompanied by restrictions upon the hoarding of gold and the shipment of gold abroad, pursuant to the authority conferred upon the Executive by Section 5(b) of the Act of October 6, 1917, 40 Stat. 411. So, also, the amendment to that Act effected by the Emergency Banking Act of March 9, 1933 (48 Stat. 1) authorized the President to "investigate, regulate or prohibit" transactions "by any person within the United States or any place subject to the jurisdiction thereof" relating to foreign exchange, gold, or coin or currency of the United States. That Act also amended Section 11 of the Federal Reserve Act (39 Stat. 752) by authorizing the Secretary of the Treasury to call in "any or all gold coin, gold bullion or gold certificates" upon payment of "an equivalent amount of any other form of coin or currency . . . of the United States". The new authority was exercised in the Executive orders of March 10, 1933, of April 5, 1933 and of April 20, 1933. Then followed Section 43 of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 51) and the "Gold Reserve Act of 1934" (48 Stat. 337).

We gather from that opinion that it was only because of the obvious relation of the Joint Resolution nullifying gold clauses, to this other legislation relating to gold and money of the United States based on gold, and only because, as Congress declared, gold clauses constituted a *substantial* and *actual* interference with the policy of Congress adopted in the exercise of its monetary power, that the nullification of gold clauses by the Resolution was upheld. It was for those reasons that the Court said in the *Norman* case (p. 316):

> "We think that it is *clearly* shown that *these* [*gold*] *clauses* interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that *such an interference existed.*"

No necessity or justification for the nullification of multiple currency clauses may be found in the Joint Resolution, in the contemporaneous legislation surrounding its enactment, in the one Congressional report, in the debates, or in the *Norman* case opinion. There has been no showing, however obscure, that multiple currency clauses actually interfere with the exertion of the monetary power granted to Congress by the Constitution, that any such

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authorizing the President to reduce the gold content of the dollar, which the President did by proclamation on January 31, 1934. The apparent object of all these legislative measures and Executive acts, including the Joint Resolution, was to reduce the gold content of the dollar and substitute for gold and gold coin "an equivalent amount" of money of the United States. Payments of foreign currency abroad could have no reasonable relation to this general monetary policy.

interference is or was substantial, or that any such interference has been determined or found to exist by Congress. And, of course, ". . . it is *primarily for Congress* to consider and decide the fact of the danger and meet it". *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 37. Until Congress has made such a determination, any extension of the Joint Resolution over multiple currency clauses, would not only be unwarranted as a matter of statutory construction, but would also be prohibited by the Tenth and Fifth Amendments to the Constitution.

Gold, as the House Committee on Banking and Currency emphasized in its report with respect to the Joint Resolution (H. R. Rep. No. 169. 73d. Cong., 1st Sess.) "is the medium upon which the entire credit and currency structure rests". For this reason the Court held in the *Norman* case that Congress had the power to control and conserve the resources of gold (p. 313); and that contracts dealing with gold, or money of the United States, or any similar subject matter within the control of Congress have of necessity a "congenital infirmity" to which they must succumb when Congress acts. See *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 307-8; *Holyoke Water Power Co.* v. *American Writing Paper Co.,* 300 U. S. 324, 341. The conclusion reached in the *Norman* case rested on the finding made after careful consideration that the contracts in question were contracts for the payment of money (p. 302). The contracts in the case at bar, as has been shown (pp. 19-32, 39-46 above), are not contracts for the payment of United States money. A contract for the payment of guilders, such as the guilder option in these bonds and coupons, is unlike a gold clause in that it obviously does not deal with a subject matter which lies

within the control of Congress and is not, therefore, subject to the "congenital infirmity" to which gold clauses have been compelled to succumb.

Although Article I, Section 8, clause 5 of the Constitution grants to Congress the power "To coin Money, regulate the Value thereof, and of foreign Coin", contracts for the payment of foreign money in the country where that money is current are not within the control of Congress. Congress may regulate the value of foreign coin in relation to the value of the dollar, it may prohibit the use of foreign coin in this country, but it should require no argument or authority to establish that Congress may not "devalue" foreign coin or currency or prohibit its use in that country where it must be accepted as legal tender. *Cf. The Collector v. Richards,* 23 Wall. 246, 259-61. The Joint Resolution is presumptively territorial, and not extra-territorial, for the very reason that it is highly doubtful whether Congress has the power to legislate as to such matters as the obligation of the Debtor here to pay guilders in Holland. As this Court said in *Sandberg* v. *McDonald,* 248 U. S. 185, 195:

> "Legislation is presumptively territorial and confined to the limits over which the lawmaking power has *jurisdiction.*"

See also *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347.

For the foregoing reasons, the Joint Resolution is valid only to the extent that it is confined to money of the United States, and to gold clauses requiring payment in gold or money of the United States; and it may not extend to multiple currency clauses, not payable in money of the United States, but requiring payment of foreign currency in the foreign country by whose law it is made legal tender.

B. The Joint Resolution if extended so as to nullify the guilder alternative in these bonds and coupons, would constitute an arbitrary and capricious interference with the property and contract rights of the bondholders, in violation of the Fifth Amendment to the Constitution.

The Eighth Circuit Court of Appeals, we believe, lost sight of the fact that Congress has no general power to nullify contracts or to relieve debtors from the hardships imposed upon them by their own contracts, executed freely, openly and without compulsion. It is natural that the Debtor should prefer to pay dollars rather than the guilders which it contracted to pay in its bonds and coupons, but such a preference on its part is equally immaterial. And it is likewise immaterial that other creditors of the Debtor would also prefer to have the contract claim for 14,033,640 guilders reduced from the stipulated dollar value of $9,512,001.19 to $5,636,000 (R. 140, 126). In urging that the petitioner's claim be scaled down by $3,876,001.19, the Debtor and its creditors are asking the courts to condone and even abet a partial repudiation. We repeat that the Debtor clearly understood that its promise to pay guilders might cost it more than the alternative promise to pay dollars would have cost. It must have known that, although its receipts and income would of necessity be in terms of dollars, its liability on these bonds and coupons would still be payable in guilders, regardless of the cost of guilders, if guilders should be elected. Nevertheless, the argument of the respondents in the courts below was that the guilder promise would impose an unwarranted hardship upon the Debtor because its income was in terms of dollars and must for that reason fall within the spirit and intendment of the

Resolution. And this argument, as we have already seen, was accepted by the Circuit Court of Appeals and largely made the basis of its decision (R. 253; 98 F. [2d], at 165-6).

The Joint Resolution was, in short, construed below so as to relieve the Debtor of the obligation of its contracts merely because that obligation proves to be burdensome. The Resolution was not construed and applied as a regulation of money of the United States, but as a repudiation statute, pure and simple, relieving debtors of those obligations which they are unwilling to pay. Such direct nullification of contracts and consequent taking of property for the sole purpose of relieving debtors from the burden of their obligations is clearly prohibited by the Fifth Amendment to the Constitution, and cannot be countenanced in any statute, whether it purports to be a monetary or, even, a bankruptcy law. So much was pointed out in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 602, where it was said:

> "If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

Consequences, however serious, may not excuse an invasion of constitutional right; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 316.

Furthermore, as we have seen, the only construction of the language of the Resolution that would permit the inclusion of the guilder alternative in these bonds and coupons is to find in the Resolution a requirement that any instru-

ment containing a dollar promise together with other promises must be discharged *in its entirety* upon performance of the dollar promise "dollar for dollar". This would necessarily relieve the obligor of every other liability or promise contained in the same instrument. Yet it was the construction given the Resolution by both courts below in holding that the bonds and coupons in suit are obligations "payable" in money of the United States and, therefore, "shall be discharged upon payment" of legal tender dollars for every dollar promised in the gold coin alternative. The destruction of all the granted alternatives in these instruments, other than the dollar alternative, is thereby accomplished wantonly and without any given or discoverable reason or justification. One is asked to assume that Congress took a dislike to alternative contracts wherever one of the alternatives happens to provide for the payment of dollars, and for that reason alone, abolished all but the dollar alternative. For, it will be remembered, under this construction of the Resolution, the presence *vel non* of a gold clause in the instrument is of no moment; as long as one alternative contains a dollar-sign, that alternative "shall be discharged" by legislative fiat, and all other promises in the instrument are thereby voided. A bond with a paper dollar and not a gold dollar clause is just as much an "obligation payable in money of the United States" as is an instrument with a gold clause. The dollar-sign and not the gold clause is controlling.

According to this construction, moreover, the nature of the promises, other than the promise for the payment of gold, that are thus destroyed would be of no consequence. A written promise to pay "a hundred dollars or 249 guilders" is to be treated no differently from a written

promise to pay "a hundred dollars or a horse". In both cases, since the instruments are "obligations payable in money of the United States" according to the decisions below, Congress is said to command that the entire instrument shall be discharged upon the payment of $100. This rule would seem to apply, irrespective whether the option is in the obligor or in the obligee. If, for example, the promisor of the last mentioned contract had the option and desired to deliver the horse promised, it would seem that he could be compelled to pay the hundred dollars in legal tender dollars.

According to the decisions below, all bonds with penalties for non-performance are within the Joint Resolution, as are all written contracts with provision for liquidated damages. All such bonds and contracts must be discharged by payment of the penalty or liquidated damages, as the case may be; and in no event, we are told, may the obligor acquit himself by performing his contract. Even if the obligor had performed in part or in whole the performance contemplated by the contract, it would seem that the obligee would still have a statutory action under the Resolution for the recovery of the full dollar amount specified in the penalty or liquidated damages clause. Thus, for example, where a fire insurance company exercises its option of rebuilding the burned premises, the insured can wait until the rebuilding has been substantially completed and then sue for the full dollar amount alternatively promised in the policy.

We do not attempt to portray exhaustively the ramifications of the holding below or the extent of the repudiation and wanton destruction of contractual rights that would be wrought by the Resolution as conceived by the Eighth

Circuit Court of Appeals. Mere suggestion of the possibilities opened up by that unsound decision is enough to show the entire absence of constitutional warrant in legislation so to be construed, and hence the error of the construction reached below of legislative language conceded by the Circuit Court to be at most ambiguous (R. 249; 98 F. [2d] at 163).

CONCLUSION

THE DECREE OF THE CIRCUIT COURT OF APPEALS AFFIRMING THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED, AND THE CAUSE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS IN CONFORMITY WITH SUCH DECISION.

Respectfully submitted,

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January 14, 1939.

APPENDIX A

[Opinion handed down by the Court of Appeals of New York on January 11, 1939, reversing the decision in 164 Misc. 498, affirmed without opinion in 254 App. Div. 839]

Court of Appeals

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., *Appellant*, v. BETHLEHEM STEEL COMPANY, *Respondent*.	No. 430-A

OPINION

O'BRIEN, J.:

March 1, 1910, Lackawanna Steel Company, predecessor of defendant Bethlehem Steel Company, issued a series of gold bonds payable March 1, 1950, in United States Gold in the sum of $1000. and also in Pound Sterling at £205.15.2 Guilders at 2480, Marks at 4200 and Francs. If paid in Francs in France, Belgium or *Switzerland,* the corporation promised to pay 5,180 Francs and interest in the respective currencies. Each coupon contained a promise that, if paid in France, Belgium or *Switzerland,* the corporation would pay 129.50 Francs for each six months interest, and that they were payable not only at New York, but at London, Frankfort, Amsterdam, at *Basel* and *Zurich* at *Schweizerische Kreditanstalt.*

Plaintiff, a Swiss corporation having its principal place of business in Switzerland, purchased 323 of these bonds. On July 16, 1936, it presented 1132 coupons at *Schweizerische Kreditanstalt* at *Zurich* and demanded payment at the rate of 129.50 Swiss Francs or an aggregate of 146.594 Swiss Francs and on September 7, 1936, it presented at the same place 323 coupons for payment at the same rate or an

aggregate of 41,828.50 Swiss Francs. On both occasions payment in these amounts of Swiss Francs was refused. The allegations in the complaint are that on July 15, 1936, the market value of 146,594 Swiss Francs in Zurich was $48,009.54 in lawful money of the United States and that on September 7, 1936, the value of 41,828.50 Francs was $13,631.90. The relief demanded in the complaint is judgment for $61,766.04 with interest. Judgment has been rendered in favor of plaintiff only for the sum of $36,375. and its complaint was dismissed in respect to its claim of right to receive 129.50 Swiss Francs for each coupon. Such judgment resulted upon the theory that plaintiff is not entitled to receive more than the value in United States currency of present legal tender reduced by reason of the Joint Resolution of Congress June 5, 1933.

The question is whether, on the facts of this case, the Joint Resolution is applicable to this obligation to pay foreign currency to a foreign corporation in a foreign country. The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continentale Treuhand, A. G. vs. St. Louis Southwestern Ry. Co.* (81 Fed. 2d, 11—1936) wherein the facts were the same at bar except that payment was made in Guilders at Amsterdam instead of Francs at Zurich. That court decided that damages recoverable in dollars were required to be calculated at gold par of the Guilder and not at the rate of exchange prevailing in New York at the time of the judgment.

On the facts of this case, the obligation was not payable in "money of the United States" but in foreign currency and therefore the Joint Resolution is not applicable. The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.

The judgment of the Appellate Division and that of the Trial Term should be reversed and plaintiff's motion for summary judgment granted with costs in all courts.

Court of Appeals

ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., *Appellant*, *vs.* BETHLEHEM STEEL COMPANY, *Respondent*.	No. 430-A

MEMORANDUM

FINCH, J. (Dissenting):

To restrict the phrase "obligation payable in money of the United States" so as to exclude a bond, if in addition, for convenience of foreign bondholders, it also provides for payment in what was meant to be an equivalent amount in Swiss francs, guilders or other foreign currency, would seem to be unduly narrowing a resolution which by its language indicated that it was of the broadest scope. A reading of the joint resolution shows it to be a resolution not only broad in scope, but one referring to an obligation as a whole rather than to any particular provisions contained therein (*Norman* v. *B. & O.*, 294 U. S. 240; *Perry* v. *U. S.*, 303 U. S. 330).

Furthermore, a detailed analysis of the language used would seem to show that the ordinary meaning of the language would reach and apply to every obligation issued before or after the 4th of June, 1933, capable of being paid in the United States. Every such obligation shall be discharged upon payment dollar for dollar in any coin or currency which at the time of payment is legal tender for public and private debts. While the first sentence of the resolu-

tion considers the obligation as a whole, and strikes down the gold clause, the next sentence provides in the most sweeping language for every obligation which is capable of being paid or may be paid in money of the United States. This language of the joint resolution does not exclude a bond payable in money of the United States because such a bond also contains a provision as a matter of convenience for the payment of the same amounts in foreign currencies. An obligation which is payable in money of the United States is no whit less such an obligation because it also gives the obligee the right to receive the equivalent of this money in foreign currency.

The obligations in suit are certainly capable of being paid in money of the United States, which bring them within the terms of the Joint Resolution. As such they are dischargeable, dollar for dollar in legal tender.

When we consider that the Joint Resolution precludes a Court of the United States from enforcing a gold clause provision, we are forced to the conclusion that such Courts may not enforce similar provisions of coupons having the same effect.

The intent of Congress being manifest, to strike down gold clause provisions and any other obstructions to its currency policy, it would seem to follow that all similar provisions contained in the principal obligation should be likewise invalid, to the end that a uniform parity should exist as to all obligations which are capable of being paid in dollars.

The judgment appealed from should be affirmed, with costs.

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